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THE  
AMERICAN LAW REGISTER.

**VOL. III.**

FROM NOVEMBER 1854—TO NOVEMBER 1855.

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**EDITORS:**

**ASA I. FISH AND HENRY WHARTON.**

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NOVEMBER, 1854.  
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ARE STATE BRIDGES CONSTITUTIONAL?

A proceeding has recently been instituted in the Circuit Court of the United States for the Eastern District of Pennsylvania, the possible consequences of which are so grave, that we take the earliest opportunity of calling to it our readers' attention. The case is one which involves a constitutional question which will affect in the most vital way, the interests of every State in the Union; and is moreover likely to create an angry excitement in Pennsylvania, which may lead to collision with the Federal authority. It is in every respect worthy of the most serious consideration. Through the machinery of this case, certain theories with regard to the central government, which have acquired of late years conspicuous prominence and development, are at last concentrated and brought to a focus. They are now set face to face, in what is perhaps a final struggle, with the principle of the sovereignty of the States in their internal affairs; and if the victory remains with them, the decision will originate the most remarkable change in the character of our government which has occurred since the adoption of the Constitution.



The case is as follows: A citizen of New Hampshire alleging that he is engaged in a trade with the City of Philadelphia, carried on in vessels which receive their cargoes in the Schuylkill river at some distance from its mouth, has brought a bill in Equity against the Penrose Ferry Bridge Company, a corporation chartered by the State of Pennsylvania for the purpose of building a bridge over that river; which bill asks for the removal of the bridge, now nearly completed, on the ground that it is an obstruction to navigation; and in the meantime prays an injunction to restrain its further progress. The Schuylkill is a stream of considerable size, flowing entirely within the State of Pennsylvania. For its last ten miles it passes through the corporate limits of the City of Philadelphia, which it then leaves to empty itself into the Delaware, upon which the city is principally built. It separates the most important portion of the town from the western and southern parts of the State, and the internal trade from those quarters, and much from the north also, must therefore of necessity pass over it; while on the other hand, the main roads of Pennsylvania concentrate upon its western banks. To accommodate this traffic, there are now open five bridges, four of them railroad bridges also, below the point to which the river is naturally navigable. Such, however, is the increase of trade and the growth of the city, that this number has become entirely insufficient, and at times very serious inconvenience is suffered; so that to remedy the evil, the legislature has been obliged to provide for the erection of several new bridges, one of which is that which is now sought to be restrained.

The principal, and almost the sole commerce of the river itself, is in the coal trade. The coal is brought down from the interior, in the barges of the Schuylkill Navigation Company, is unloaded at wharves below the present Permanent Bridge, and there reshipped into coasting vessels. The Penrose Ferry Bridge is a couple of miles below this point. It is provided with a draw, and and is some eight feet above high water. It would furnish no obstruction to the passage of boats or barges, but would delay or prevent the passage of coasting vessels with masts. On account of

the injury to him in this respect, the complainant who is affected in the last category, has asked the interference of the Court. It is understood, however, that the Schuylkill Navigation Company, a Pennsylvania corporation, are the real parties.

The complainant applied to the Court for a preliminary injunction, upon affidavits; while an answer was put in, denying the equities of the bill. No direct legislation on the part of Congress over the Schuylkill was shown, but it was insisted that Philadelphia lying on Schuylkill, had been always a port of entry, and that the revenue officers exercised their duties on that river, which it was argued was equivalent to a direct regulation. But the main stress of the argument turned upon a general denial of the right of the State to authorize in any manner, the obstruction of a navigable stream. And this was the view of the Circuit Judge, under the *Wheeling Bridge* case,<sup>1</sup> recently decided in the Supreme Court; and he accordingly expressed his opinion at once, in favor of granting the injunction. The District Judge, however, reserving his opinion as to the main question, dissented on the ground that the point was too important a one, and that too many valuable improvements by the States depended for their validity upon its determination, to justify the Court in settling the question upon preliminary injunction. The Court being divided, the matter rests for the present an open one.

If this case of the Penrose Ferry Bridge were an ordinary matter of private litigation, we should not consider ourselves justified, whatever might be its general interest or the strength of our convictions, in obtruding an opinion on its merits at this stage of the controversy. We are fully aware of the impropriety of a popular discussion of legal questions while waiting adjudication, as well by journals of a legal, as of any other character, and would scrupulously abstain from a course of such a nature. But with regard to questions of constitutional law, and especially one of such importance as the present, we conceive it to be entirely different. They are matters in which the people, lawyers and laymen, are

<sup>1</sup> 13 How. 518.

most deeply interested, and upon which they are all more or less competent to express an opinion. They affect the very foundations of the social structure, and their determination reacts upon the future as well as the present. Over them the action of the Judiciary is final and irrevocable, and binds posterity like a Fate. The right of public criticism upon such subjects, therefore, to be valuable, must be exercised freely and with a jealous promptness, and its jurisdiction cannot be abated by a plea that the matter is still before another tribunal.

Regarding the matter in this light, we believe that we shall be guilty of no disrespect to the very able Court, before whom this case is now pending, in submitting some arguments which convince us that the power which it is asked to exert, is beyond its constitutional functions. We will, in so doing, simply exercise the ordinary and undeniable right of every citizen, and shall not, we trust, be open to the charge of attempting to anticipate judicial decision.

The question to be discussed may be stated generally, as follows: Are the courts of the United States authorized to declare void an act of a State legislature, with regard to the use of a public stream, as for instance, in authorizing the erection of a bridge, in so far as such legislation interferes in any way with its previous navigability?

Before entering upon the investigation of the nature and principles of our government, which the determination of this question necessarily requires, we must first establish briefly certain elementary principles of law, which underlie any discussion thereof. For even these, in the political controversies of which it has been the subject, have become tainted with fallacies which must be filtered off, before we can rely upon the purity of our reasoning.

Public streams, in all countries, whether under the Roman or the common law, have been supposed to belong to the State, and to constitute part of the public domain held in trust for the benefit of its citizens. The ownership of property necessarily implies the right to determine what is its most effective and beneficial mode of employment; and, where it is held in trust, this right becomes also a duty. As to every species of public property, therefore, the State is vested with an absolute discretion as to the manner in which it is to

be used; that discretion to be exercised for the benefit of its subjects. Thus, land over which it possesses direct dominion, may be granted away, or sold, or if it be retained, may be employed in the way which is deemed most advantageous. So of the indirect dominion for the purpose of making roads, which may be exercised for the establishment of highways or turnpikes, or railroads, or on the other hand, of vacating them again, just as the general interest demands.

The principles which apply to a State's ownership of public streams, are identical in their nature. That ownership is of the whole stream;—its water and the fish it contains, its bed and the islands which rise above the surface. These constituent elements of the property may be applied to various uses, among which the State is bound, as a duty to its citizens, to select the most important. Usually this is its fitness for navigation; but that is by no means always the case. A common fallacy in the discussion of this question, is to assume quietly that navigability is the only characteristic of a public stream, and to argue upon that basis. It is, however, merely the usual test of public property, because it is assumed that where it exists, the State cannot have parted with dominion. But the fact of navigability, and the right of the public to navigate, are not identical. In order to the latter, there must be superadded a determination by the State of the special use to which the stream is to be applied, in the shape of a declaration that it shall be, thenceforth, a public highway. A State may, and sometimes does, reserve to itself the bed and fisheries of a non-navigable stream; and on the other hand it may destroy navigability in a river belonging to its domain, in order to employ it for other ends. Thus, it may erect a dam over a stream for the purpose of supplying a city with water, or to reclaim valuable marsh lands and improve the healthiness of the country. It may be necessary also to destroy an old channel in straightening a river, or in making a canal. So where a river possesses valuable fisheries, the State may choose to subordinate the navigation to them, as the more important.

But the control of the government does not rest here. There is a habit among a certain school of politicians in this country, of con-

fusing navigation with commerce, though the two are not at all identical. A stream may be fitted for the former, while it is really an obstacle to the latter. Every one is aware that in all large countries, there are certain lines of trade as definite in their direction as the currents of the ocean. It often happens that a river, technically navigable, but circuitous and proceeding from a region which is barren and destitute of trade, lies across one of these lines of traffic, which is extremely important. Common sense at once dictates that it is the duty of the State to subordinate navigation to commerce by the erection of bridges. So the mere convenience of the inhabitants of a populous district ought to induce a legislature to contract the limits of navigability of a stream which passes through that district, if no greater injury is done to trade. Nature, in short, acts blindly, and it does not follow because a stream exists, that it is put in the best place for man's uses. And it is also to be further observed in connection with this point, that as to the internal trade of the United States, land traffic by railways is now universally admitted to be more valuable than water traffic, since it is much more expeditious and direct, requires less transshipment, and is, in so far, the cheaper and better. The rude and primitive use of nature's instruments is giving place to the employment of the contrivances of human skill and science.

It is therefore abundantly obvious from what has been said, and it is a pity that so simple a matter should need demonstration, that the ownership of a State in a public stream consists in the right and the consequent duty, to employ it, whether in, or to the exclusion of navigation, as in its discretion it shall consider best for the public. And this discretion is not merely argumentative, it is not merely a right and a duty consequent upon ownership in trust, but it is further a necessary one, involved in the very existence of society, and must be vested somewhere. There needs to be, for instance, in some body in the State, the power to supply its crowded cities with water, to connect its different districts with each other by bridges, to prevent pestilence from its marshes, to utilize its valuable fisheries, and so forth. This discretionary power must obviously belong to the sovereign, who alone, through the owner-

ship of the public domain, has the material and physical means to make it effective.

Now let us consider our own system of government, and see in whom the sovereignty over a public stream lying entirely within the limits of one of the several states, is vested; that is to say, who owns the stream and its bed? We are precluded from abstract inquiry on this point by an uniform series of decisions of the Supreme Court of the United States,<sup>1</sup> which declare that this sovereignty as that over the rest of its territory, is entirely vested in the State, subject to the constitutional authority of Congress and the Judiciary. Our argument therefore leads us to this, that the right and consequent duty to employ a public stream which lies entirely within one of the States, belongs to the State to exercise for the public benefit, subject to any constitutional restrictions which may exist thereon. And this conclusion is further shown to be correct by the tenth amendment to the constitution; for the power to make bridges, dam, canals and the like for local purposes, is neither delegated as such to the United States, nor prohibited to the States, and is therefore reserved unto the States.

Having thus disposed of one branch of our argument, we proceed to examine the question as to what, if any constitutional restrictions this State power is to be exercised under and controlled by. The power, to repeat, is the right to determine the best use for a public stream, and to employ it according to that use. There is obviously among the formal prohibitions upon the States, none which bears upon the point. The provision that "the citizens of each State shall be entitled to the privileges and immunities of citizens in the several States," has no reference to general legislation over rivers by a State, with regard to both its own and citizens of another State; for it gives only equal and not superior rights to the latter.

<sup>1</sup> For instance, *Martin v. Waddell*, 16 Pet. 410; *Pollard v. Hagan*, 3 How. U. S. In the latter case, it was said, speaking of public streams: "The United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a state or elsewhere, except where it is expressly granted," which is only as the Court proceed to show, under Art. I, Sect. 8, cl. 16, with regard to the District of Columbia, &c.

And the fact that in changing the mode of use of a stream, a State may affect public or private rights of navigation, affects no provision of the United States constitution, for it is well settled that the divesting of vested rights, except where there is an actual contract on the part of the State, is entirely within its power, and even if prohibited by its own constitution, cannot be inquired of by courts of the United States.<sup>1</sup>

Finding no express limitation upon State legislation over this subject, we turn next to the article establishing the federal judiciary, to discover if in that be vested any prohibitory power over such action. By name there is given none. Is it implied? The interference with the use of a public stream is a nuisance at common law. The United States, however, has no common law jurisdiction, as has been thoroughly established; and therefore against them there can be no nuisance.<sup>2</sup> The only nuisance cognizable is under the laws of the State, and where it is expressly authorized by the State, that question falls to the ground. The power of the federal Judiciary, to interfere in such case, can therefore arise only where the act of the State is in conflict with some exclusive power in Congress to legislate upon the subject.

We are, therefore, brought finally to examine the powers delegated to Congress for that implication of restriction of which we are in search. Among these, we find that "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." This is the only one which bears in the remotest degree on the subject, and accordingly the most violent efforts have been made by those who desire to place in the hands of the general government a controlling power over the internal affairs of the States, to extort out of it a meaning which shall suit their wishes. We hope to establish, however, that however elastic these words may be, they cannot be made to cover the particular question which we are considering.

<sup>1</sup> Charles River Bridge v. Warren Bridge, 11 Pet. 540; Watson v. Mercer, 8 Pet. 110.

<sup>2</sup> It was admitted in the Wheeling Bridge Case that there could be no public nuisance against the United States prior to legislation by Congress.



We have first to determine what is the exact meaning of the clause, and having settled that, then to ascertain how far the power which it grants is exclusive of State legislation.

With regard to the first branch of this inquiry, we are able to enter upon its investigation with a greater confidence in the accuracy of the result, than is the case in most discussions upon legislative phraseology, on account of the scrupulous care with which the language of the Constitution is known to have been prepared. During the sittings of the Convention it was subjected to the most minute and jealous consideration, and after passing through that ordeal, was submitted for a final revision to Mr. Gouverneur Morris, than whom no man of his time was more precise and exact in the use of words, or better instructed as to their true signification.<sup>1</sup> We ought not to anticipate, therefore, much vagueness or latitude in the use of terms, and may consider etymology a safe guide.

What, then, are we to understand by a power "to regulate commerce"? The word "commerce" is plain enough in itself; it means trade of all kinds carried on between different States or countries.<sup>2</sup> It is equally applicable to traffic over land and to that by water, and was so used at the time when the Constitution was framed. The trade between France and Belgium, across their frontiers, is as much a commerce, as that between England and this country. And

<sup>1</sup> See Mr. Madison's letter, in Sparks' Life of Morris, vol. i, page 284.

<sup>2</sup> Commerce can also be defined as "intercourse," and to some extent it has that signification in the Constitution. But the term only applies to intercourse of trade, including that in passengers, when standing by itself; if used more broadly, it is by a metaphor, which is indicated by the context. *Commercium* (*con* and *merx*) was originally a technical term of the Roman Law, signifying the right to trade as a merchant. Andrew's Freund, *sub verb.* *Commercium est emendi et vendendi invicem jus*: Ulpian, Fragm. Reg. tit. xix, § 5. This right, as proceeding from the Roman law of property and obligations, which properly belonged to and could be enforced by Roman citizens alone (*jus Quiritium*), was extended from time to time, as a special privilege, to particular foreigners, who were then styled *peregrini quibus commercium datum est*. Certain species of property, also, which could not be bought and sold, as temples, sepulchres, &c., were hence called *res extra commercium*. In English and French, the primary signification of the word is universally in accordance with its derivation. Jacobs, "that mighty blunderbuss of law," in his dictionary, treats it as a law term, and gives it solely this meaning.

traffic "with the Indian tribes" was in old times, as it is now, almost exclusively by land. Navigation, therefore, as we have before remarked, is not in itself commerce; it is only one of the means by which it is carried on. The railroads which reticulate the country, are as truly its vehicles as the ships which swarm in our ports. On the other hand, the term is properly referable to external trade, and that it was used in this sense in the clause with which we are dealing is plain, since it is commerce with *foreign* nations, and *among* the States, which is to be the subject of regulation. We find, consequently, nothing in the word to indicate an intention to confer upon Congress the power to interfere in the domestic and internal affairs of the States. It has reference simply to the relations of a State with its fellows or with foreign countries, As to what goes within the borders of Pennsylvania, for instance, the word is void of meaning. It has nothing to do with the building of bridges for facilitating local intercourse, the granting out of fisheries, the supply of towns with water, or the like; and to regulate "commerce," therefore, does not mean to regulate such matters as these.

As to the word "to regulate" itself, we are thrown entirely upon its pure etymological sense, as at the time of the adoption of the Constitution, as now in England, it had no special or technical signification. Men spoke of "regulations of commerce," but we believe that the verb is not specially employed in that connection except in this country. "To regulate" properly means, to fix or determine the rules according to which some thing, or set of things, are to act, or be carried on, or employed. It does not involve the sense of establishing, or creating, or originating that which is regulated. It refers to things which are now or may hereafter be existing, under their own laws or modes of action, which are by this regulation to be brought under and subordinated into some harmonious system. We speak of regulating a clock, or the currency, or a household, or a school, but we do not mean to imply that we make what we regulate, or even that it belongs to us. Suppose, for instance, the power was conferred upon the Mayor of Philadelphia "to regulate all the clocks within its limits," we could not,

without great violence to language, assert that this authorized the city to set up a clock manufactory, or to compel the citizens to buy only its own clocks, or to prohibit any one who had a clock from using its machinery for any other purpose, if he pleased. We could only infer that the object was to insure an uniformity in the standard of time throughout the city, and to authorize the use of the usual means for that purpose.<sup>1</sup>

Now, when we speak of a power to regulate commerce, we mean, therefore, simply a power to establish a system of regulations of commerce, that is to say, of external trade by land or water. We do not mean a power to establish commerce, or to determine where it shall go to, or to make the instruments by which it is carried on. It cannot be strained to authorize the building of ships, or the construction of railways, the laying out of roads, or the bridging of rivers. People, in 1788, (and in the old Colonial time, to their cost,) knew what "regulations of trade" were. They were tariffs,

<sup>1</sup> No better commentary on the meaning of this word in the Constitution, could be found than its use in the Articles of Confederation, both in an etymological light and from the historical connection between the instruments. In the 4th paragraph of Article IX. of the latter, it is declared that Congress should "have the sole and exclusive right and power of *regulating* the alloy and value of coin struck by their own authority, or by that of the respective States. . . . *Regulating* the trade and managing all affairs with the Indians. . . . Establishing and *regulating* post-offices. . . . Making rules for the government and *regulation* of the land and naval forces, and directing their operations." Here we observe that "regulation" is properly discriminated from the originating or making, the managing, the establishing, the governing and the directing anything. Again, as the land forces under the Confederation were to be "raised, clothed, armed and equipped" by the States, a further illustration of "regulation" is given in the article, viz., that it may be applied by one government to what is created and furnished by another. Further, as that which is contemplated is declared to be "sole and exclusive," it implies that there might be "regulation" by Congress which was not exclusive, *per se*, of State regulations. Finally, by Article VI. it is provided that no State should "grant commissions to any ship or vessel of war, or letters of marque, &c., except . . . under such *regulations* as" should be established by Congress. Now, as the power to grant letters of marque, &c., belongs only to sovereignty, it appears that the exercise of State sovereignty over a subject is not inconsistent with a power in Congress to regulate its action; and therefore, *e converso*, the power to regulate in the one is not exclusive of sovereignty in the other.

and navigation laws, pilotage, quarantine and inspection laws; the object of which was to harmonize, to protect, to encourage the development of commerce, or to prevent certain injurious effects of its reflex action at home. By strong implication, the regulation of commerce may be understood to extend to the building of lighthouses, the survey of the coast and rivers, and even, perhaps, the removal of the obstructions of navigable rivers; though such a construction as this has been repudiated by a large body of men in this country, including some who were the most active in the Federal Convention. By a violent wrench of these words, and by bringing them in connection with the power to establish post-roads, a few have insisted on the authority of Congress to make public roads as commercial highways, though this is pretty much abandoned now. But by none has it ever been contended that the bridging or damming of rivers for local purposes was a regulation of commerce. It might just as well be applied to the building of a city, or the laying out its streets, in a State; for these may be also the agents of commerce.

So much for the natural signification of the clause in question; and we shall now briefly examine its history, for it has one, to discover whether that can impart to it any new and more extensive sense.

In the discussions prior to the Revolution, the Colonies generally admitted in Parliament the power to make "regulations of trade" so far as external commerce was concerned, but denied to it that of interfering directly in their internal affairs. The right to make bridges and dams and roads, &c., was, indeed, always exercised exclusively by the former. This distinction was frequently taken, both in common language and in the Colonial documents.<sup>1</sup>

<sup>1</sup> It is not necessary to make very numerous citations to establish so common a matter of history; the following will suffice. In the report of the Committee on Colonial Rights to the Congress of 1765, it was contended "that there was a vast difference between the exercise of parliamentary jurisdiction in general acts for the amendment of the common law, or even in general *regulations of trade and commerce* throughout the empire, and the actual exercise of that jurisdiction in levying external and internal duties and taxes on the Colonists;" and exactly the same

On the declaration of independence, the power to regulate trade fell to and became divided among the several States. We all know how the error of the Articles of Confederation,<sup>1</sup> in omitting to vest this power in Congress, gave rise to a jarring system, or want of system, of discordant regulations of trade among the States; each one striving, by duties or prohibitions, to grasp to itself commercial advantages to the exclusion of the rest, yet all powerless against the advantages of concentration in foreign countries, till commerce fell paralyzed and exhausted. This mortifying history need not be recounted here. It is sufficient to recall the fact that this state of things was one of the chief causes for the call for a Convention to amend the Articles of Confederation. In the resolution of the Virginia Legislature, appointing Commissioners to call the Convention of 1786, which met at Annapolis, the object was stated to be "to take into consideration the trade of the United States; to examine the relative situations and trade of said States; to consider how far an uniform system in their *commercial regulations* may be necessary to their common interest and their permanent harmony;

language was used in the petition of that body to the House of Commons. The Declaration of Rights of the Congress of 1774 elaborates and enforces the same distinction. "The English Colonists," it was said, "are entitled to a free and exclusive power of legislation in their several provincial legislatures . . . in all cases of taxation and internal polity. . . . But from the necessity of the case and a regard to the mutual interests of both countries, we cheerfully consent to the operations of such acts of the British Parliament as are *bona fide* restrained to the *regulation* of our external commerce; . . . excluding every idea of taxation, internal or external." Among the private papers of the time, we need refer only to a letter of Mr. Gouverneur Morris to Mr. Penn, of Philadelphia, (May 20th, 1774,) in which, explaining what he conceives to be the proper basis of continuing the union with Great Britain, he says: "The right of *regulating trade* to be vested in Britain, where alone is found the power of protecting it; . . . not that Britain should lay imposts on us for the support of government, nor for its defence, nor that she should *regulate* our internal police. These things affect us only. . . . But can it be said we are competent for *regulating trade*? The position is absurd. . . . If Great Britain, if Ireland, if America, if all of them are to make *laws of trade*, there must be a collision," &c. (Sparks' Life of Morris, vol. i. p. 25.)

<sup>1</sup> The Articles of Confederation, however, provided for the "regulation of trade" with the Indian tribes, and in a connection which indicates the restricted sense in which they understood it, as we have shown in a note to a previous page.

and report to the several States such an Act relative to this great object as will, when unanimously ratified by them, enable the United States, in Congress, effectually to provide for the same." "This resolution," says Mr. Madison, "met with a general acquiescence."<sup>1</sup> Resolutions in almost identical language were adopted by Pennsylvania, Delaware, New York and New Jersey. Though the Convention proved abortive in itself, the resolution by which it was called indicates sufficiently what was then understood by a power "to regulate commerce" in Congress. It was clearly supposed to be in no way inconsistent with the Articles of Confederation, under which we know the States preserved almost independent sovereignty. Moreover, the fact that such a resolution originated with "general acquiescence," in Virginia, which afterwards adopted the Constitution only after much debate, and by but a small majority, because of its restriction of State rights, is cogent proof that the words it uses were meant to grant no authority to Congress which could by any possibility embarrass the action of the States in their internal affairs.

We now come to the Federal Convention, and we discover from the reports of its debates by Judge Yates and Mr. Madison, the remarkable fact that the clause in question was introduced into and continued from the first draft to the final revision of the constitution, in substantially its present form, without one word of objection from any side. It seems to have been designedly connected with and grafted on the old power of Congress under the confederation, of "regulating trade with the Indian tribes," and we have seen how restricted the meaning of these words then was.<sup>2</sup> The clause also passed unassailed by Luther Martin, in his famous address to the Legislature of Maryland; in the various conventions of ratification, at least according to the reports of them in Elliott's Debates; and in the contemporary political literature. But one objection was any where urged, and that but faintly,—that it gave Congress the power to create monopolies. Now, we put it to any man of common sense and unbiassed judgment, to any student acquainted

<sup>1</sup> Madison Papers, vol. i. page 695.

<sup>2</sup> See note, *ante*, page 11.

with the state of parties in and out of the convention at that time, and informed of the jealousy with which so many regarded anything which might even remotely affect the independence of the States ; we put it to such a person, we say, whether it is possible that men of such perspicacity and bitter animosities as the opponents of the constitution were, could possibly have failed to perceive the dangerous bearings of a power "to regulate commerce" given to Congress, if it really were open to the construction which is now attempted to force upon it. Their silence is the most convincing evidence that no such meaning could then be honestly attributed to the words.

And, on the other hand, we have an equal proof that the advocates of the constitution designed as little such a result. In the convention, the only remarks of any of the members bearing on the question, which we can discover, are those which Mr. Madison reports himself to have used on one occasion, when the question as to the power of Congress over export and import duties was under discussion. "The regulation of trade between State and State" he said, "cannot affect more than indirectly to hinder a State from taxing its own exports, by authorizing its citizens to carry their commodities freely into a neighboring State, which might decline taxing export, in order to draw into its channel the trade of its neighbors."<sup>1</sup> And equally limited in their understanding of the bearing of the words were the authors of the Federalist. They devote but a small space to the examination of the clause, as though it were a matter scarcely worthy of apology ; placing its defence simply on the ground that it was necessary to prevent vexatious and retaliatory regulations among the States, and obviously regarding it as not extending in any important degree beyond the fulfilment of that object.<sup>2</sup>

<sup>1</sup> Madison Papers, vol. iii, p. 1835.

<sup>2</sup> In considering this clause, it is said : "A very material object of this power was the relief of the States which import and export through other States, from the improper contributions levied upon them by the latter ; were these at liberty to regulate the trade between State and State, it must be foreseen that ways would be found out to load the articles of import and export, during the passage through their



So far we have the obvious meaning of the words, and their historical and contemporaneous interpretation, leading to the same result. It is hardly necessary to say that this result is confirmed by the usage of both the central and the State governments. The latter, during the past sixty years, have invariably exercised the exclusive power to develop their internal resources, the control over their roads, and that over their public rivers. No instance of any interference of the United States exists; though the bridging and damming of streams have gone on continuously before their eyes since the adoption of the constitution. Nor have the United States claimed the right to declare a navigable stream, any more than a common road, within the limits of any single State, to be a public highway; such declaration always coming from the State.

Nor need we delay much to argue that this result is in accordance with the fundamental theory of our government. Whatever diversity of opinion there may have been upon the development of that theory, there never has been any question from the beginning, that it was designed to give the Federal government supreme power over all general matters, to which the States were incompetent or unsuited to legislate separately; and to leave to local action and development all internal affairs and such matters over which the States could legislate without affecting the harmony of the whole system. Such a system of government is the only one which could have been accepted in

jurisdiction, with duties which would fall on the makers of the latter, and the consumers of the former. . . . To those who do not view the question through the medium of passion, or of interest, the desire of the commercial States to collect, in any form, an indirect revenue from their uncommercial neighbors, must appear not less impolitic than it is unfair. . . .

The necessity of a superintending authority over the reciprocal trade of confederated States has been illustrated by other examples, as well as our own." The writer then proceeds to illustrate the exercise of this power in the cases respectively of the Confederacies of Switzerland, Germany, and the Netherlands, in which, as he observes, it was employed to compel a free passage of merchandise over the constituent States, unrestricted by tolls or duties; but as we know, never to authorize the slightest interference in local or domestic improvements or affairs. (Federalist, No. xlii.) No other instance of commercial regulation, except Navigation Laws, which belong to foreign commerce, is given.

1789, and it is even more emphatically the only one possible in 1854. The vast expanse of our territory would make any attempt on the part of the Federal government to establish any system of regulations for internal application, whether commercial or otherwise, as ridiculous as unconstitutional. Does one man in a hundred in Congress know anything about the nature of the domestic wants of New Mexico, or Iowa, or Texas? Can he say what is the best mode of developing the resources of those States? Can he take the map of California, for instance, and say, "Here should be a road, and here a bridge; this river shall be dammed to collect its golden sands; this shall be brought over an aqueduct to supply a city with water; and this shall be left free to bear upon its bosom the white sails of commerce?" There are few, indeed, who do not see that as regards at least the internal relations of the States, the only true system of regulations of commerce is that which simply removes all restrictions upon its free development, and leaves to the States themselves, who alone can be properly acquainted with their local circumstances, the determination of the channels in which it shall flow. Nor is this a policy which is suited to our own country alone. The best writers on government in Europe, agree upon its being the true and final theory for every civilized State, except those of the smallest territorial extent. Local self-government is viewed as the only guard and remedy against the evils which now afflict so profoundly the whole continent; and centralization, whether bureaucratic, in the hands of a department, or commercial, in the hands of large trading cities, is declared to be only tyranny in disguise. It is not for this country to prove retrograde in political science.

To conclude this part of the argument, therefore, we conceive it to be a matter of irrefragable demonstration that the power to regulate commerce, whatever else it may exactly comprehend, certainly does not authorize Congress to interfere in the development of the resources of any State, or to take out of her hands the disposal of her own property; nor, in particular, to exercise for the State the discretion, which is the chief element of such property, to determine whether her navigable streams shall be declared public highways, or dammed for sanitary or other local purposes, or bridged

to facilitate the intercourse of her citizens. Assuming, therefore, that these are matters purely of State legislation, and not of commercial regulation, we proceed now to consider how far the power of Congress over the latter may incidentally, since it cannot directly, affect and control the former.

There is no doubt that where a power given to Congress is exclusive over its subject matter, legislation by a State over the same subject matter is void, and must be declared so by the judiciary. A power may be exclusive in terms, as is the case with the legislation of Congress over the District of Columbia, dock-yards, and so forth; or it may be so from necessary implication. This implication, again, may be made from the words of the Constitution, as with regard to the power to establish an *uniform* rule of naturalization; or it may result from the nature of the object of the power, in cases where that object might be defeated by State legislation on the subject matter. Now, with regard to its object, a power may have been vested in Congress either from convenience or necessity. From necessity, as where the object cannot be attained by separate State legislation, in which case, whether exercised or not, if the power be for general purposes, it is absolutely exclusive; if for special purposes, as taxation, it is exclusive so far as those purposes extend. From convenience, as where the object is a necessary one, but can be better attained by the legislation of Congress; in which case, till Congress acts on the subject matter, State legislation is not only proper, but unavoidable. With regard to the last hypothesis, there is a further distinction to be taken between legislation by Congress over the whole subject matter, in which case State legislation is entirely excluded; and partial and incomplete action by Congress, in which case State legislation is only affected *pro tanto*. Again, a power may have several objects, and have been vested in Congress with reference to them, partly from convenience and partly from necessity. One or more of its objects may be such as cannot be attained by State legislation; others may be such as it is more expedient to vest in Congress. In such case it is exclusive before its exercise, only as to the former, and not as to the latter. Thus, as to the naturalization laws, Congress has only prescribed

the mode of naturalization, but its effect is left to the several States. And finally, since we have hitherto been dealing only with cases where a power of Congress and State legislation are directed over the same subject matter, there is a broad distinction between all such cases, and those where though the subject matter of the one power professedly differs from that of the other, a conflict is produced in their independent exercise, which requires a partial subordination of State authority, in order to the harmony of the system. In the latter class of cases, there is this most material and vital difference from the former, that whereas, when the subject matter is the same, complete legislation by Congress actually annuls State legislation *in toto*; when the subject matters are different, State legislation is only affected in so far, and to such an extent, as it touches incidentally the other subject matter. Thus, a general bankrupt law annihilates State bankrupt laws; but a general road law of a State, under which a road might be made to pass through a dock-yard, is only affected to that particular extent. In these last cases, however, the power of Congress which is to be considered, is still to be regarded as falling under one of the categories above enumerated, and which therefore need not be repeated.

Now, as we think we have established, the power to determine in what manner State property, and as a part thereof, its public rivers, shall be most advantageously employed, has never been expressly, or by implication as a regulation of commerce, granted to Congress. Hence, as its subject matter is different from that of the power over commerce, it falls within the final and comprehensive distinction which has just been taken. As a general power, it is not withdrawn from the States, whether the power to regulate commerce be exclusive or not; but will be merely limited in its exercise in so far as it overlaps, as it were, and intrudes upon the latter. The right and duty of a State as a matter of municipal sovereignty, to determine upon the best use of its navigable streams, consequently cannot be controlled by the judiciary upon any general principle of exclusion, but only, if at all, when in particular instances it incidentally affects commerce in a way inconsistent with Congressional supremacy.

In order to determine, then, the nature of this supremacy, we proceed to consider under which of the categories of exclusion, before considered, the power to regulate commerce falls. In the first place, even, admitting for the moment, which we have denied, that such a power comprehends the right to declare what roads or rivers in the separate States, shall be deemed public highways, and the right to decide in what channels, or in what directions, or by what instruments, the reciprocal commerce of the States shall be carried on; that right has never yet been exercised. These things have hitherto been left to the action of individuals, and the discretion of the States. No direct conflict, therefore, can arise between the two. A State, in the disposal of its public domain, cannot at present cause the prostration of any bridge, or the obstruction of any highway erected or opened under the power to regulate commerce. By the disposal of this question of fact, we are enabled to regard the power, as, in so far, merely potential and abstract. And since it is made exclusive neither expressly, nor by implication from the language of the Constitution, we must expect that exclusiveness to be involved in the objects for which it was conferred upon Congress. We have only to consider, according to our previous distinction, whether it be one which has been vested in Congress from necessity, from expediency, or from both.

Without embarrassing ourselves at present to discuss the exact limitations of the power, which indeed we have to some degree done before, it must be agreed that certain matters which come within the strictest definition of a regulation of commerce, are proper subjects of State legislation, at least in the absence of that of Congress. Thus quarantine laws, pilot laws, at least in most cases,<sup>1</sup> port regulations, the survey and improvement of the channels of rivers, inspection laws, the law which governs common carriers, are universally admitted to be matters of State jurisdiction, till Congress chooses to provide a general system for one or all. They are obviously matters upon which local legislation, until such general

<sup>1</sup> Quarantine and pilot laws in the States have been indeed expressly authorized by Acts of Congress. But it is decided that if the power to regulate commerce be exclusive, it is one that cannot be delegated to the States by Congress; and, therefore, the acts would in that view be unconstitutional and inoperative. See *Cooley vs. The Wardens, &c.*, 12 How. U. S. 299, 319.

system be substituted, is proper and unavoidable, and in some cases even of superior advantages. So far as they are concerned, therefore, the power to regulate commerce is one vested in Congress from convenience, and not from necessity, and their existence destroys its exclusive character. The language of the Constitution itself, indicates the necessity of such a conclusion. The States are prohibited, unless with the consent of Congress, from laying imports or duties on imports or exports, "except what may be absolutely necessary for the execution of *their inspection laws*." Inspection laws are regulations of commerce, and one exception to the supposed exclusiveness of the power, is thus recognized. On the other hand, there is an express prohibition against laying import, export and tonnage duties, which are also commercial regulations.<sup>1</sup> On every principle of construction, therefore, we are to conclude that there may be some such regulations which in the view of the framers of the Constitution were within the authority of the States.

On the other hand, it is not to be doubted that with regard to some of its objects, the power was intended to be entirely exclusive. From its history, and from the explanations of the Federalist, we know that the clause was principally designed to correct the defects

<sup>1</sup> The inference that the express prohibition of commercial regulation in one form, implies the permission of such regulation in others, if not excluded on distinct grounds, has been denied to be valid as regards the clause in question; because it is said that the particular prohibition was intended only as a partial restriction of the right of taxation, unquestionable in itself as a matter of State sovereignty, but which, when exercised in the form of impost and tonnage duties, would be also a regulation of commerce, and, therefore, a conflict with the power given to Congress. But this, however plausible, does not affect the argument when stated in other terms. The express prohibition of the legitimate exercise of State sovereignty in one form, which also amounts to a regulation of commerce, implies the permission of such exercise of sovereignty in other forms, though also regulations of commerce, if not excluded on different grounds. That is to say, if taxation is expressly prohibited when it becomes a regulation of commerce, it implies that bridge building is permitted even if it be considered as a regulation of commerce. Besides, such reasoning is really destructive of the side on which it is urged. For if the power to regulate commerce were of itself absolutely exclusive, it would prevent any exercise of State sovereignty of another nature which assumed that shape, and the special prohibition of taxation as a commercial regulation, would have been unnecessary and absurd. See on this point, the remarks in the Federal Convention, in the Madison Papers, Vol. iii. p. 1585.

of the Confederacy ; which, while it permitted the commercial States, by means of the imposition of duties upon the transit of goods over their territories, and legislation of a like character, to benefit themselves at the expense of their neighbors, yet was at the same time powerless to protect the Union against hostile legislation in other countries, on account of its want of power to compel harmonious and combined action. Keeping in view, then, that these were the evils to be remedied, we need not hesitate to admit that any State legislation in the way of regulating commerce, which is intended to or does in fact secure special advantages for one State over the rest, or which would paralyze the action of Congress in protecting our commerce against the legislation of other trading nations, is entirely excluded. At the same time, this view of the objects of the power authorizes us to say that the exercise of legitimate State sovereignty in ways which, though within a comprehensive definition of commercial regulation, do not tend to produce either of the evils just specified, was not intended to be prohibited, in the absence of legislation of Congress upon the same subject matter.

Admitting, then, for the sake of argument, that the power to regulate commerce comprehends the right to declare what shall be public highways, and what the channels, instruments or objects of trade, we are unable to see how the exercise of State sovereignty over such matters, over which indeed legislation of some kind is unavoidable if Congress persists in remaining silent, could be considered as liable to produce the evils against which the Constitution intended to guard. Where, for instance, a State which has declared a river entirely subject to its sovereignty, to be a public highway, subsequently revokes that declaration so far as to authorize bridges for more important local purposes, no reasonable man can pretend for an instant, that this action of itself will either secure to the State wrongful commercial advantages at the expense of its neighbors, or interfere in the remotest degree with any actual or conceivable legislation by Congress, with regard to foreign nations. Such action of State sovereignty, therefore, is not excluded by the power to regulate commerce.



Now, if we arrive at this conclusion, even when we admit that the matters we have just enumerated to be within the power granted to Congress *a fortissima ratione*, does the conclusion hold, if our argument that they are not included in that power, be correct. We have shown that these matters, belonging solely to the State sovereignty, constitute a different subject matter from that of the power of Congress, and hence, that the exercise of that sovereignty over them is excluded, not generally, but only when in particular instances it would interfere with the Congressional power. Hence, we are not obliged to inquire even what the tendency of the State right to bridge public streams would be if it were truly a regulation of commerce, but only to determine with regard to each bridge that is built, whether it tends to secure to the State illegitimate advantages in matters of commerce, over its fellows, or whether it affects Congressional legislation as to foreign trade. How such a question could arise with regard to a bridge built solely for local purposes, we are unable to understand.

We have thus endeavored to show that matters of the character which we have been discussing, fall properly within the province of State legislation, and are incidental to and inseparable from territorial or municipal authority; that they are not comprehended within the power to regulate commerce given to Congress, either according to the natural or historical interpretation of the language of the Constitution, or upon any rational theory of its distribution of powers between the Federal Government and the separate States; that even if they were so comprehended, the power over commerce would not be exclusive over them, since, in the absence of its exercise, State legislation thereon is necessary, and would not interfere with the objects of the grant of the power to Congress; and finally, that as they are not comprehended in, or conflicting with the Congressional power, they necessarily remain exclusively within the control of the States. Besides this direct line of reasoning, however, there are some strong arguments to be drawn from the inconvenient and dangerous consequences which would follow if we admit the position that the Federal Judiciary is vested with power of prohibiting the exercise of



State legislation over such matters. These we proceed to state as briefly as possible.

The first of these consequences to which we would call attention, is the extraordinary latitude which the construction against which we contend, would vest in the Judiciary, to interfere and control the internal affairs of the States. If their legislation over public streams may be prohibited, because it would obstruct them as highways of commerce, so may their legislation over public roads, over which its sovereignty is equal and of the same nature. The power to regulate commerce applies, as we have shown, to land as well as water traffic; it affects the trade over the roads, as much as that over the rivers leading from one State to another. If a State cannot limit the navigability of a stream, neither can it improve or vacate, or change the direction of a turnpike. In particular, if Pennsylvania cannot affect the destination of the Schuylkill, because goods are carried on it into other States, *a fortiori* it cannot control the employment of the streets of Philadelphia, which are also public highways, and over which a commerce to other States, of immensely greater value, daily passes; nor can it authorize the city corporation to make municipal regulations for that purpose. And this conclusion is not affected by any distinction between streams, as natural, and roads, as artificial, means of communication. The banks of a river, the valleys through a mountain range, are as much channels of trade, given by nature, as the rivers which flow through the State.<sup>1</sup>

If the argument be correct, indeed, nothing is left in the states to legislate over. Roads and valleys, navigable streams and city streets, are all tabooed. State sovereignty must henceforth retire to the barren peaks of its mountains, there to sit like the eagles, in solemn but very inefficacious majesty, eyeing the gradual advance upwards of trade, and the federal judiciary. But this melancholy

<sup>1</sup> Even in the flattest country, the best track for a road becomes marked out before man sets to work. An old cow path, which is emphatically a natural means of communication, was the origin of one of the greatest of the commercial streets of New York; what was afterwards added to make it what it is, was merely an improvement on the original plan.

result need not really be dreaded. The conclusion, though unavoidable, if the premises be correct, is too absurd, and utterly beside and beyond the intention of the framers of the Constitution, to be admitted for an instant; and we may conclude, therefore, that they did not hold the premises.

Again, the construction against which we contend, would withdraw from the states a most important and necessary class of powers, without placing in the hands of the United States any equivalent therefor. Congress has no authority to build bridges for local purposes, or to supply towns with water, or drain marshes, yet it is argued that the power to do these things is prohibited to a state. The use of public streams for any purpose, but the often unimportant one of navigation, is thus annihilated, and in a manner only parallel in the energy of another aquatic prodigy, the hands of the states are to be paralyzed by the least contact with their traffic by water. Now, if there be any one reasonable principle of construction of the Constitution, it is that no exercise of sovereignty can be deemed to be denied to the separate states, unless because it is vested in a more effective form in the United States. The federal convention intended a complete, thorough, and regular distribution of legislative powers between Congress and the local governments. It did not purpose to beget a mutilated hybrid, with the most important functions omitted. If it took away a power from the states, it was only to transplant it into the higher sphere of federal authority, in order that it might produce better and more fruitful results; it destroyed only by substitution. It is, therefore, a most powerful argument against any construction, which, while it admits in Congress no legislative authority on any particular subject matter, seeks to prohibit over it to the States, any necessary and essential exercise of sovereignty. Nothing but the most imperative language can compel us to such a result.

There is a final argument against the construction in question, which is that it would vest in the Judiciary, a power which is *prima facie* inconsistent with the proper functions of that branch of the government.

We have insisted, several times before, that navigation by itself is not commerce, which may be carried on across as well as upon public streams, and may be, and indeed often is actually obstructed by the latter. Where, with relation to any public stream, both species of commerce exist, it must not unfrequently be a question, which is to be subordinated to the other; and one which can be decided only by determining which of the two is the more important. This is, however, a matter exclusively for legislative discretion, to be exercised upon a full and fair consideration of the interests of both. It cannot be predicated, therefore, of any particular employment by a State of a public stream, that it is an interference with commerce, until it be first ascertained that the course of commerce is exclusively or principally along the stream. Until this be settled, it might be argued with perfect propriety, that the state action, as in the erection of bridges, was really a facilitation of the commerce of the locality. Now, the federal Judiciary has the power to prevent obstructions to navigation by a State, not on the ground of public nuisance, because, as regards the State, its legislation has put an end to that question, and because, as regards the United States, there can be against them no nuisance at common law; but only when they amount to an interference with commerce. But as we have seen, to determine how far the obstruction of a navigable stream is an interference with commerce, requires an act of legislative discretion. Congress has never exercised that discretion, and to place it in the hands of the United States Courts, would be to confer legislative functions upon them.<sup>1</sup> The argument, therefore, which would prohibit to the States the sovereign power of bridging its streams, must end for the present, at least, in transferring to the Judiciary the power "to regu-

<sup>1</sup> It is true, that in the ordinary cases of nuisance by the obstruction of a navigable stream, a State Court is not required to, and indeed, cannot counterbalance any collateral advantages of the obstruction against its interference with the navigation. But this is because the State has previously declared that it shall be a public highway, and neither the Court nor private individuals have the right to overrule this decision. The federal judiciary, however, when a state declares that one of its rivers shall not be a public highway, has only the question to consider how far that will interfere with commerce, not how far it interferes with navigation.

late commerce." Whether this result would be more desirable, as a matter of expediency, than in permitting the power temporarily to the States, it is not necessary to inquire, since whoever has, the Judiciary unquestionably has not the function of legislation on this subject.

We have now gone over the argument, which we think conclusively negatives the power of the federal judiciary to interfere with the State control of navigable streams, at least in the absence of any congressional exercise of the power to regulate commerce. Having completed this task, we should have gone on to examine the decisions of the Supreme Court of the United States, upon cognate topics, in order to justify and confirm our reasoning, or at least to show that they contained nothing to affect its validity. But we have already so far overstepped the limits which we had assigned for our remarks, that we must abandon for the present that intention. In justice to ourselves, however, we must state, that while we have endeavored to construct what we believe to be a fair and incontrovertible argument from the language of the constitution, and the principles of our government, we are fully aware how trite most of the topics are, after the exhaustive and remarkable discussions by the bench and bar, during the last quarter of a century. We must further, acknowledge that some of the positions which have been taken, though not the more important ones, are impugned by the language of the judgments, in the famous case of *Gibbons vs. Ogden*, in that of the *Wheeling Bridge*, and perhaps in the *Passenger* cases; though not by the decisions themselves. But while we admit fully the conclusive authority of the actual decisions of the federal Judiciary, upon cases arising under the constitution, we cannot attribute the same supremacy to the reasoning of individual judges. Nor with whatever respect we regard in particular the opinions of Chief Justice Marshall, *clarum et venerabile nomen*, can it be denied, that in subsequent cases the Court has shrunk from carrying out to their logical result, the broad doctrines which he promulgated in some of his decisions.<sup>1</sup> We need

<sup>1</sup> In the well known Blackbird Creek case, 2 Pet. 250, where a dam for local purposes was held constitutional, Judge Marshall subordinated his own logic to the requirements of practical necessity.

only instance *Cooley vs. The Board of Wardens*,<sup>1</sup> where it was expressly decided that State pilot laws are regulations of commerce, and that the power "to regulate commerce," in Congress, is not in so far exclusive; and *Veazie vs. Moor*,<sup>2</sup> where it was held that the grant by a State to a company, of the exclusive right to navigate for a term of years a river, which they were to render navigable, was constitutional.

Upon the same principle, we may be allowed to acquiesce entirely in the wisdom and propriety of the decision in the Wheeling Bridge case, which is that upon which most stress is laid in this connection, without being unqualifiedly bound by the line of reasoning adopted by the able judge, who delivered the opinion of the majority of the Court. In that case the bridge which was complained of, obstructed a river which flowed through, and was the property of several distinct States; and upon the doctrines of international law, as held in this country, and the principles of private law, with regard to riparian owners, there was an unquestionable invasion of the proprietary rights of the supra-riparian State. It was as much a "controversy between two States," as to property, as any of those with regard to boundaries and the like, which are decided by the Supreme Court, without any regard to the "power to regulate commerce." To no greater extent are we bound to receive it. We feel ourselves justified, therefore, in thinking that the discussion of the questions arising in the case, which has been the occasion of this article, is not estopped by any actual judicial decision. Our reasoning may be deemed imperfect, inconclusive or erroneous, and how unsatisfactory our efforts are in comparison with the importance of the subject we are fully aware, but it cannot be said to be precluded by any authority before which private opinion must bend.

In conclusion, we perhaps ought to ask our readers to pardon the undesigned length to which our remarks have extended, but the magnitude of the question which has occasioned them, is our obvious excuse. It is a subject upon which every citizen ought to feel earnestly, to think decidedly, and where he can do so without presumption or disrespect, to express himself freely. Nor have we sought to make them the vehicle of any particular political theory. We are

<sup>1</sup> 12 How. U. S., 299., 319.

<sup>2</sup> 14 How. U. S., 568.

not indeed, among those who would withdraw from the federal government an iota of the authority which it possesses; we would even desire to see it more powerful, more respected, more effective than it is at present. But we are deeply convinced that it must be strengthened from the centre, and not from the extremities. It is not by vexatious interference with local improvements and legislation, by the work of simple prohibition and destruction, that the federal supremacy is to be invigorated and renewed, or wavering attachments regained. There must be first provided for the States, a better, higher and more complete system, than those which originate in their independent action; if these indeed be now as jarring and defective as is alleged. Local legislation over commerce, is to be displaced only by harmonious and uniform regulation by Congress, which must thus vindicate its power to prohibit, by the fulfilment of its duty to create. The exercise of the federal authority in this way, however, has been thus far deemed to be injudicious, inexpedient, or unlawful, and the development of the resources, and the encouragement of the internal commerce of the Union, have been left entirely to individual and local legislation. Surely, if the discretion of Congress has been thus deliberately employed, it is neither wise nor equitable for any other branch of the government, to embarrass or interfere with the action of the States, in the honest completion of the task entrusted, if we ought not rather to say, abandoned to them.

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#### RECENT AMERICAN DECISIONS.

*In the Circuit Court of the United States, District of Indiana.  
November Term, 1853.<sup>1</sup>*

**WILLIAM JOLLY ET AL. vs. THE TERRE HAUTE DRAW-BRIDGE COMPANY.**

1. Under the grant of power to Congress, to regulate commerce among the several States, as given by the Constitution of the United States, the general government has jurisdiction over navigable streams, so far as may be necessary for commercial purposes.
2. A steamboat, enrolled and licensed pursuant to the Act of Congress, is entitled

<sup>1</sup> This term was held by Judge Leavitt, of the Ohio District, by the appointment of Judge McLean, pursuant to the Act of Congress of the 29th July, 1850, in the place of Judge Huntington, of the Indiana District, who was unable to attend, owing to sickness in his family.

to the protection of the general government, while engaged in carrying on commerce between different States; and her owners have a right to use the navigable streams of the country, free from all material obstructions to navigation.

3. In relation to the States carved out of the N. W. Territory, the guaranty in the ordinance of '87, as to navigable streams, is still in force.
4. The Courts of the Union, having jurisdiction of the parties in a civil suit, are competent to administer the common law remedy for an injury sustained by reason of an unlawful obstruction in a navigable stream, without any express legislation by Congress, giving the remedy, and prescribing the mode of its enforcement.
5. The national jurisdiction over navigable streams does not deprive the States of the exercise of such rights over them, as they may deem expedient, subordinate to the power granted by the Constitution of the United States.
6. A bridge of sufficient elevation, or with a proper draw, is not necessarily an impediment to navigation; neither is any structure or fixture such impediment, which facilitates commerce instead of being a hindrance.
7. The inquiry in this case is, whether the bridge with the draw erected by the defendant at Terre Haute, is a material obstruction to the navigation of the Wabash river.
8. If it occasions merely slight stoppages and loss of time, unattended with danger of accident to life or property, it is not such obstruction.
9. The Terre Haute bridge was built under a charter from the State of Indiana, which required a "convenient draw" in the bridge. This imports a draw which can be passed without vexatious delay, or risk; and, if not such a one, the charter is violated; but if it meets the requirement of the act of incorporation, and is yet a material obstruction, it is a nullity for the want of power in the legislature to pass such an act.
10. If the jury find the bridge is a material obstruction, but that the injury sustained by the plaintiffs' boat was the result of recklessness, or want of skill in those having charge of her, the Bridge Company are not liable, and evidence of the good professional reputation of the pilot will avail nothing, if in this particular case, he was reckless and unskilful.
11. Depositions taken under the Act of Congress, without notice to the opposite party, are admissible in evidence; but it is for the jury to determine the weight and credibility to which they are entitled.
12. The evidence of experts, if uncontradicted and unimpeached, is entitled to great weight.
18. If the jury find for the plaintiffs, they may include in the damages given, the probable earnings of their boat, for the time she was delayed in repairing the damages sustained.

*O. H. Smith and S. Yandis, for Plaintiffs.*

*R. W. Thompson and J. P. Usher, for Defendant.*



JUDGE LEAVITT charged the jury, as follows :

This suit is brought by the plaintiffs, as owners of the steamer *American Star*, to recover damages sustained by that boat in passing through the draw of the bridge across the Wabash river, at Terre Haute.

The material facts presented to the jury by the evidence are, that the *Star*, a stern-wheel boat, duly enrolled and licensed at the port of Cincinnati for the coasting trade, with the usual complement of officers and men, under the command of William Jolly as master, also a part owner, was engaged in the navigation of the Wabash river, making regular trips for the conveyance of passengers and freight, from Cincinnati to the highest point of navigation on said river; that in March, 1852, the water being at a high stage, as she was descending the river, in passing through the draw of the Terre Haute bridge, bow foremost, and partially laden, she struck with considerable violence against one of the piers of the bridge, her guards on one side being thereby broken, the top of the pilot-house carried away, and one of her chimneys thrown down, with some other minor injuries; that as the result of the collision, the boat was detained nearly two days at Terre Haute, in making the necessary temporary repairs, to enable her to prosecute her trip, and one week at Cincinnati, in making permanent repairs; the actual cost of which is proved to have been \$371; that owing to her crippled condition after the injury, she was unable to receive freight offered below Terre Haute, to the amount of some \$150 or \$200; and that one entire trip was lost, the usual and estimated profit of which is stated at \$1,000.

The bridge was a wooden structure, with a draw having a space between the piers of about sixty feet, and at the top of the draw, when raised, of thirty or forty feet. It was erected by the defendant, under an act of incorporation granted by the legislature of the State of Indiana, containing a provision requiring the corporators to construct "a convenient draw" in the bridge.

This brief outline of the case will suffice as preliminary to the consideration of the questions of law, which have been presented



and argued with great ability by counsel, and upon which the instructions of the Court have been requested.

It is not controverted by the counsel for the Bridge Company, that the Wabash is a navigable stream; nor is it denied that the plaintiffs' boat, at the time the alleged injury was sustained, was employed in carrying on commerce between ports and places lying in different States. But, it is insisted, that as this bridge was erected under the authority of the State of Indiana, and in conformity with the charter granted by the State, it cannot be deemed an obstruction to navigation, in the sense of entitling the plaintiffs to compensation for the injury complained of.

The Constitution of the United States contains an explicit grant of power to Congress, to regulate commerce among the several States. Under this grant, there can be no question of the competency of Congress to exercise jurisdiction over all the navigable streams, to the extent that may be necessary for the encouragement and protection of commerce between, or among, two or more States. This doctrine is so well settled by the uniform legislation of Congress, and the frequent adjudications of the Supreme Court of the United States, as to render its discussion here wholly unnecessary. It is regarded as equally clear that the boat, the owners of which in this case are seeking compensation for an injury sustained, having been duly enrolled and licensed by the proper officer, in pursuance of an Act of Congress, was rightfully employed in the navigation of the Wabash river, and that her owners, while she was so employed, have a right to the free use of that river, and were entitled to protection against all unlawful obstructions to its navigation. It follows, that for any injury attributable to such obstructions, the law will give the needful redress. Nor is it necessary for this purpose, that there should be any express legislation of Congress giving the remedy, and regulating the manner of its enforcement. The Courts of the Union, if the plaintiff is a citizen of a State other than that in which he brings his suit, have jurisdiction, and are competent to administer civil remedies for such injuries, upon the principles of the common law, without any statutory enactment for that purpose. This doctrine is clearly established by

the decisions of the Supreme Court of the United States, in the *Wheeling Bridge Case*. 13 Howard's S. C. Rep. 518.

There is another ground on which the right of every citizen of the United States to the free and unobstructed navigation of the Wabash river, may be confidently asserted. The State of Indiana is one of the States carved out of the North Western Territory, and therefore subject to the operation of that article of the compact contained in the ordinance of 1787, which declares that "the navigable waters leading to the Mississippi and the St. Lawrence, and the carrying-places between the same, shall be common highways," &c. While it is admitted that some of the articles of compact in that ordinance have been superseded by the admission of the States within the North Western Territory into the federal union, it has been held by repeated judicial decisions, that the solemn guaranty referred to is still in full force, and is a perpetual inhibition to such States from authorizing any impediments or obstructions to the free navigation of the water courses within its scope. *Spooner vs. McConnel et al.*, 1 McLean, 337; *Palmer vs. Commissioners of Cuyahoga County*, 3 McLean, 226: *Hogg vs. Zanesville Man. Co.*, 5 Ohio R. 416.

But, in maintaining the paramount jurisdiction of the national government over navigable streams, and the operative force of the guaranty in the ordinance of '87 in regard to them, it does not follow that the States are deprived of all power of legislation. Judge McLean, in the case above cited from the third volume of his Reports, says: "A State, by virtue of its sovereignty, may exercise certain rights over its navigable waters, subject, however, to the paramount power of Congress to regulate commerce among the States. This principle is distinctly recognized in all the cases referred to, whether arising under the commercial power of the general government, or the ordinance of '87. It has never been claimed that the States do not rightfully possess jurisdiction upon and over the navigable water courses within their limits. Such a claim is clearly in derogation of the sovereignty of the States, and therefore, wholly inadmissible. But, while the right of the States is thus conceded, it is well settled that in the exercise of their ju-

risdiction, they shall not infringe on that granted to the national government by the Constitution of the United States; and that in reference to the States formed from the North Western Territory, they cannot disregard the provision of the ordinance referred to.

This limitation of the power of the states is not inconsistent with their claim of sovereignty; nor does it involve necessarily, any conflict of jurisdiction between them and the government of the Union. The states have all the power over their water courses, which is necessary for local or state purposes. The right of a state to punish crimes committed on its streams, and to authorize and enforce such police regulations as may be necessary for the protection of her citizens, has never been questioned. It is equally clear that a state may adopt such measures, in reference to its water courses, as are required by its citizens in facilitating trade and commercial intercourse. Hence, the states properly exercise the right of establishing and licensing ferries, and authorizing the construction of wharves. They may also sanction an apparent obstruction of a navigable stream, by authorizing the erection of dams and locks; for the obvious reason that these are not hindrances to navigation, but are promotive of its benefits. Nor can there be a doubt that it is competent for a state to authorize the erection of a bridge across a navigable stream within its limits. But in all the cases referred to, the power must be exercised subject to the restriction, that the right of free navigation is not essentially impaired. If a bridge is erected, it must be sufficiently elevated to admit of the safe and convenient passage of such boats or vessels as are most advantageously used for the conveyance of travellers or freight upon the river or water course spanned by the bridge; or, if not thus constructed, there must be a draw of such size and structure as not materially to infringe the right of free and unobstructed navigation.

It is however a question not clear of doubt, whether it is practicable to place a draw-bridge across a stream, subject to high floods, and with a rapid current, as is the fact in reference to the Wabash, without materially impairing its safe navigation. This description of bridge is obviously better suited to tide water streams or such as

have little or no current, in reference to which, they may be used with little hindrance to navigation.

The jury, however, in this case, may properly limit their inquiry to the question whether the Terre Haute Bridge, with its draw of the size and structure proved at the time and under the circumstances in which the injury to the plaintiffs' boat was sustained, was an essential impediment to the navigation of the Wabash, and this leads necessarily to the further inquiry, what constitutes such an impediment?

Without going at length into the consideration of this question, it may be stated that slight difficulties occasioning short stoppages, and some loss of time, such as proceed from ferries, locks, dams, and even bridges, as already intimated, are not to be viewed as material obstructions. But, if these involve much loss of time in passing them, or danger of accident or injury to life or property, or the use of extraordinary caution, they do essentially impair the right of free navigation, and subject those placing such obstructions in a navigable stream, to damages for injuries which they occasion.

In reference to the Terre Haute Bridge, it will be proper for the jury to give due weight to the evidence of the witnesses, who have had much experience in steamboat navigation on the Wabash, and who say that in their judgment this bridge, especially in descending the river, is a serious obstruction to navigation. There is also a clear preponderance of proof to the effect that it is the more usual practice in descending the river, to round to some distance above the bridge, and thus by means of a rope made fast to the shore, to let the boat descend, stern foremost, slowly through the draw. This process, as stated by some of the witnesses, occupies from ten to thirty minutes; and by some, it is stated the detention is an hour, and sometimes an hour and a half. The Court has no hesitation in saying, if the difficulties presented by this bridge are of a character requiring this precaution and this loss of time, it is a material obstruction to navigation.

In the Wheeling Bridge case, before referred to, it appeared that of the great number of steamers upon the Ohio river, there were but seven which could not safely pass under the bridge at ordinary

stages of water, without lowering their chimneys. These seven boats could let down their chimneys, but the operation was attended with delay and some danger; or, they could navigate the river, though with less speed, with chimneys considerably reduced in height; and yet, the Supreme Court of the United States held, that the bridge was an essential impediment to navigation—in fact, a public nuisance; and decreed that unless so altered as not to impede the passage of any of the boats used on the Ohio, it must be abated. This decision, emanating from the highest Court of the Union, is obligatory on this Court, and must be received as the law, so far as applicable to the present case.

Having reference to the principles here stated, it will be the duty of the jury to pass upon the question, whether from the evidence, the Terre Haute Bridge is an impediment to the navigation of the Wabash river. It is insisted by the counsel for the Bridge Company, that the structure has been erected in compliance with the charter granted by the State of Indiana, and that therefore, the company are not liable for the injury complained of. The charter, as before stated, authorizes the erection of the bridge, with “a convenient draw.” This clearly implies that it shall be such a draw as may be used without vexatious delay or loss of time; and also with safety to persons and property. Nothing less than this will meet the requirement of the act of incorporation. And if the jury find the charter has not been complied with, it cannot shield the defendant from liability for the injury sustained by the plaintiff in passing the bridge. Or, if the jury come to the conclusion from the evidence, that the bridge and draw are in accordance with the charter, and yet a material obstruction to navigation, the company are liable, if ordinary skill and care were used in navigating the plaintiffs’ boat through the draw. For reasons already stated, it was not competent for the Legislature of Indiana to authorize a structure across the Wabash, which would be an essential hindrance to its navigation; and any law conferring such authority, is a nullity.

It will therefore be a proper inquiry for the jury, whether the plaintiffs’ boat in passing the bridge, was managed with ordinary

skill and caution. For, conceding the bridge to be an unlawful obstruction, yet if the plaintiffs' injury is clearly referable to the reckless and unskilful management of their boat, the company are not responsible for such injury. On this point, as on all others involving the weight and credibility due to the witnesses, the jury are the exclusive judges. If the evidence of the pilot, who was at the wheel, and of others connected with the boat is entitled to credit, the proof is satisfactory that the boat was managed with skill and caution. She was not let down stern foremost by a rope, as was the more usual way of passing the draw; nor is it regarded as essential to the plaintiffs' right to recover for an injury sustained in passing the draw, that such a precaution should have been used. Some of the witnesses express the opinion that this is the safer course, while others having skill and experience in the navigation of the Wabash, say that neither prudence or safety requires it. The pilot of the boat has testified very intelligently, and with apparent candor, and says that he did not consider it necessary to pass the draw stern foremost. He also says that great care and caution were observed in passing through the draw, and that the injury to the boat was not the result of either carelessness or want of skill. He also says the boat would have passed safely through the draw, but for a strong wind which suddenly struck her, and caused her to veer from the course he was steering. In this statement the pilot is corroborated by several of the plaintiffs' witnesses, while most of the witnesses for the defendant say they have no recollection that there was any wind, exceeding a very moderate breeze. This is not viewed as a material point in this case, as the liability of the Bridge Company is in no way affected by the state of the wind, or its influence in causing the collision. If the bridge is an unlawful obstruction, and the plaintiffs used ordinary care and skill in passing it, the company are responsible for the injury, irrespective of the agency of the wind. And this for the obvious reason that wind or no wind, the injury could not have been sustained, but for the fact that the bridge was there.

It is proper here to remark, in reference to the pilot of the plaintiffs' boat, that the evidence is satisfactory as to his professional

character. He had served in that capacity for some years, on the Wabash, and it is in proof that he is esteemed a safe, prudent and skilful pilot. But notwithstanding this evidence of general good professional reputation, if in this particular case he evinced recklessness and want of skill, and the injury to the plaintiffs' boat is attributable to that cause, they must bear the consequences of his misconduct.

In this case, a large proportion of the evidence for the plaintiffs is in the form of depositions of persons who were on the boat at the time of the accident, and of others experienced in the navigation of the Wabash, who have been examined as experts. These depositions were taken at Cincinnati, without previous notice to the opposite party, and without the attendance of his counsel. This mode of taking testimony is expressly authorized by an Act of Congress. It is liable to the objection that the opposite party is precluded from the opportunity of cross-examining the witnesses, and thus testing the truthfulness of their statements. It is, however, the right of the party against whom depositions thus taken are to be used, to re-call and re-examine the same witnesses, if he deems it necessary. The defendants in this case have not availed themselves of this right; and the plaintiffs' depositions are therefore committed to the jury, as taken by the other party, without any cross-examination by the defendant. Under these circumstances, it is insisted by the defendant's counsel that these depositions should be viewed with suspicion, and that they are entitled to very little weight by the jury. On this point, it is only necessary to remark, that these depositions are by law admissible to the jury as evidence; and, although they would be entitled to greater weight if taken upon notice to the other party, and with an opportunity for cross-examination, they are, nevertheless, entitled to credit, unless otherwise impeached. It is, however, for the jury to give them such consideration as they may deserve.

It has been before noticed that a part of the evidence for the plaintiffs in this case, consists in the opinions of experts—those experienced in and familiar with the navigation of the Wabash—as to the practical effect of the Terre Haute Bridge upon the navi-



gableness of that river, and the correctness of the professional conduct of those entrusted with the management of the plaintiffs' boat in passing the bridge. In reference to this description of evidence, it is only necessary to remark that for the obvious reason that those best acquainted with any particular art, profession or business, in all matters directly concerning them, are accounted more satisfactory and reliable witnesses than those who have no such skill or experience. Hence it is well settled, that the testimony of intelligent and credible experts is entitled to the most respectful consideration. The principle here stated, applies as well to navigation as to any other art or occupation.

It only remains for the Court to say, that if the jury find the plaintiffs are entitled to their verdict, the amount of damages to be awarded is wholly with them. The actual expenses of repairing the injury sustained by the plaintiffs' boat forms, of course, an element in estimating the amount. But it is, moreover, proper to bring to the notice of the jury, a late decision of the Supreme Court of the United States,<sup>1</sup> having a direct bearing on the question of damages in this case. That Court has held, that in an action for an injury by collision with another boat, the boat of the plaintiff not being in fault, he was entitled to compensation, in damages, for the profits his boat would have made during the time necessarily lost in repairing the injury sustained. No reason is perceived why the same principle does not apply to the present case. If, therefore, the jury find for the plaintiffs, they should include in their verdict, the amount of the probable earnings of the plaintiffs' boat during the time she was delayed in making the repairs necessary to refit her for service. This amount will be settled by the evidence before the jury, on that point.

The jury returned a verdict for the plaintiffs, assessing their damages at \$1,000. A motion for a new trial by the defendants was overruled.

<sup>1</sup> The case referred to is that of *Williamson and others vs. Barrett and others*, 13 How. S. C. Rep., 101. The same principle was decided in this case by the Circuit Court of Ohio, 4 McLean, 589.



*In the District Court of Philadelphia—Sept., 1854.*

## PROUTY vs. HUDSON.

1. As a general rule, debts sued for and intended to be set off, must be mutual and due in the same right.
2. Where a judgment has been obtained against executors *individually*, they cannot set off this judgment against one obtained by their decedent in his life-time against their judgment creditor, because the claims are not between the same parties nor in the same rights.

Rule to set off judgment.

The opinion of the Court was delivered by

SHARSWOOD, P. J.—The defendants have produced the evidence that they are the executors of Brown, and show a judgment in favor of Brown against the plaintiff, which they ask to set off against the judgment in this case. The judgment in this case was obtained against them individually, in an action of trover.

The set-off of one judgment against another, is not within the statute of set-off. It is a practice which has long prevailed in the courts of this State as well as England, to allow such set-off upon the equitable principle that in conscience and morality all that the party really owes is the balance. In the exercise of this jurisdiction, while not absolutely bound to allow set off in all cases in which it would be allowable under the statute, the Court however have adopted the rules established in the construction of the statute. More especially the rule that the claims asked to be set off, should be between the same parties and in the same right, has received the unequivocal sanction of the courts here as well as elsewhere, in regard to the set-off of judgments. *Best vs. Lawson*, 1 Miles, 11; *Dunkin vs. Calbraith*, 1 Brown, 47; *Mason vs. Knoulson*, 1 Hill, 215.

It seems to be well settled in England, that a defendant sued for his own debt, cannot set off a debt due to him as executor or administrator, because debts sued for and intended to be set off, must be mutual and due in the same right. 1 Tidd's Practice, 718; 2 Williams on Ex'rs, 1,200. The last named writer cites *Bishop vs. Church*, 3 Atkins, 691; *Gale vs. Suttler*, 1 Young & Jervis, 180.

There is one American case which is to the same point. *Thomas vs. Hopper*, 5 Alabama R. 442. Although there is no case in Pennsylvania expressly to the very point, yet *Halliday vs. Bissey*, 2 Jones, 347, was decided upon, a distinction altogether unnecessary, if the rule be not the same here. It was there held that when the debt arose upon a contract made with the executor, though acting in his character as such, he was entitled to make it the subject of a set-off in a suit against him for his own debt.

There seems to be good reason for the rule. It would be to allow the executor to pay his own debt with the assets of the estate. If such payment were made *in pais*, the creditor receiving the payment, with knowledge of the circumstances, would be liable to those beneficially interested in the estate. Can it be equitable to compel the plaintiff to accept in part payment what he may be called on hereafter to pay again or expend, if the executors should prove to be insolvent? Or if the judgment of the Court would protect him, is it equitable to preclude the creditors and legatees from their right to question the validity of the transaction, and follow the assets of the estates into the hands of a party unequivocally cognizant of their misapplication? What a wide door is open to fraud and collusion under the sanction of a Court of justice, by adopting either horn of this dilemma.

It is said that upon the allowance of the set-off, the defendants would be chargeable with the amount in their account as executors, and a doubtful debt might be thus saved to the estate. The same reason would hold in allowing payment or transfer of assets *in pais*—the executor might sell and put the money in his pocket, and it comes at last to his personal responsibility. But it does not so come in all cases. There are some guards which the law has placed against the misapplication of trust funds, which it is quite important to the interest of *cestui que trusts*, often helpless women and children, should be carefully preserved.

Rule discharged.

*In the Supreme Court of Pennsylvania.*APPEAL BY LEAH PASSMORE'S ADMINISTRATOR IN THE DISTRIBUTION  
UNDER THE WILL OF HENRY ETTER, SR.

1. When a devise or bequest is ambiguously expressed, it is always important to bear in mind the inclination which the law has in favor of the heirs, which, with us, is a rule of equality, and also in favor of a vesting of the estate at the death of the testator, or at the earliest possible period thereafter, and also in favor of an absolute, and against a defeasible estate.
2. It is under the influence of this bias, that words of survivorship are generally referred to at death of the testator, if there be nothing indicating a contrary intention.
3. Where land was devised to a son for life, with the provision that at his death, without issue living, it "shall revert to my estate, and shall be sold by my executors, and the proceeds thereof distributed among my surviving heirs herein named, agreeably to the intestate laws of Pennsylvania." Held, that this created a vested remainder in the devisees and legatees living at the death of the testator, subject to be divested on the son's dying, leaving issue, and that the share of one of the devisees who died before the termination of a precedent estate, passed to her legal representatives.

The opinion of the Court was delivered by

LOWRIE, J.—The estate which the testator had granted to his son Henry, having terminated, the question now arises what disposition he intended should be made of the reversion. He says it "shall revert to my estate, and shall be sold by my executors, and the proceeds thereof distributed among my surviving heirs herein named, agreeably to the intestate laws of Pennsylvania," and this is the provision that is to be interpreted.

In other parts of his will he provides for his living children, and for the children of those that were dead. In relation to the clause in question, it is very apparent that he does not use the word "revert" in the strict legal sense; for he certainly means to exclude Henry from having any share in the reversion. In other words, the estate which the devisees or legatees take, is not by way of reversion, but as a gift of the reversion. It is intended for only some of his heirs, and is therefore only a remainder. For the same reason he does not use the word heirs, as correctly indicating their re-

lation to him, but descriptively, meaning his children and grandchildren.

The trouble is to ascertain what he means by his "surviving heirs herein named," and it arises from the fact that his daughter Leah died without issue, before her brother Henry's estate terminated. Was she surviving heir of her father within the meaning of his will? If, when he wrote it, he was thinking of his children and grandchildren who had already died, or who might die before he did, then she was. He does not describe those who are to take after Henry's death, as those who shall be *then* surviving heirs, nor as the survivors of his devisees, but his surviving heirs who are herein named; which grammatically refers to the present time, that of making the will. And such also would be the most natural construction of a gift of the reversion to be divided "agreeably to the intestate laws."

But the case presents itself in other aspects. The estate granted to Henry, was in terms a life estate, with remainder to his unborn issue, "if such he shall have to survive him." Now, if we treat this as an estate tail, the clause we are especially considering gives a vested remainder in the other devisees. If it was only a life estate, with a contingent remainder in favor of his unborn children, then there was a vested remainder in the other devisees, subject to be defeated by the death of Henry leaving issue living. In either way, therefore, the other devisees or legatees had a vested estate at the moment of the testator's death. 3 Madd. 410, 2 State Rep. 69; 1 Baldw. 174; 2 Keene, 284; 7 W. & S. 279. This view is very important, for it gives to the devisees an estate independently of the directions concerning distribution, and makes those directions merely the means of placing them in the enjoyment of it. And if we give the fullest meaning that is allowed here, to his word "revert," we arrive at the same result; for as a reversion, it must vest in them immediately on the taking effect of the temporary estate of Henry, that is, on the testator's death.

When a devise or bequest is ambiguously expressed, it is always important to bear in mind the inclination which the law has in favor of the heirs, which, in Pennsylvania, is a rule of equality, and also in favor of a vesting of the estate at the death of the testator, or

as early as possible thereafter, and also in favor of an absolute, and against a defeasible estate. All these principles are of use here.

It is in perfect accordance with them, and under their influence, that it has so often been decided that the word survivors shall be referred to the death of the testator, if there is nothing indicating a contrary intention. It favors, in this instance, equality among his heirs or devisees, and we see no word tending to show that he meant to place Leah on a different footing from the others. He makes no provision in defeasance of her estate in any event, but, on the contrary, he seems to say that it shall go to her as an heir, agreeably to the intestate laws. It requires clear expressions or implications to divest her vested estate.

We are therefore of opinion that when he provided that the remainder should go to his "surviving" heirs, he meant, as testators very often mean by that word, his "other" heirs, or rather devisees and legatees. And when he said "agreeable to the intestate laws," he added a confirmation to this view.

It is not necessary to allude to the sale of the land, except to say that it could not be sold as Henry's after it fell back to the estate, and that the sale was proper then, only under the power given to sell and distribute according to the clause principally discussed.

Decree accordingly.

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*In the Court of Errors of Mississippi.*

HATCH WHITFIELD vs. WILLIAM P. ROGERS.<sup>1</sup>

1. The principle is well established, that every common trespass is not a foundation for an injunction, where it is only contingent and temporary; but if it continue so long as to become a nuisance, the Court will interfere and grant an injunction.
2. The rule is laid down that, in order to give jurisdiction, there must be such an injury, as from its nature is not susceptible of being adequately compensated by damages at law, or such as, from its continuance or permanent mischief, must occasion a constantly recurring grievance.
3. A private individual may obtain an injunction to prevent a public mischief, by which he is affected in common with others.

On appeal from the Northern District Chancery Court at Fulton :  
Hon. Henry Dickinson, Vice-Chancellor.

<sup>1</sup> We are indebted to the civility of the Reporter for the sheets of his forthcoming volume. This case is reported in 4 Cush., 84.

The facts are substantially stated in the opinion of the Court, by

Mr. Justice HANDY.—This was a bill filed in the District Chancery Court at Fulton, by the appellee, against the appellant, to enjoin him from the erection of a mill-dam. The bill alleges, in substance, that the complainant's lands, which lay in the vicinity of the mill-dam about to be made, would be inundated by the construction of it, so that their value would be greatly lessened and much of the timber killed, by the damming up of the water; and that the health of the neighborhood would be greatly injured by the stagnation of the water produced by the dam. The answer denies the material allegations of the bill, and much testimony was taken on both sides. The Vice-Chancellor directed the following issues to be tried in the Circuit Court of Monroe County, where the matter complained of was located. 1. Whether the mill-dam would operate a private nuisance to the complainant. 2. Whether or not it would operate a public nuisance to the neighborhood in which it was to be erected.

And on the trial in the Circuit Court the jury found a verdict that it would operate as a public nuisance; upon the return of which verdict to the Vice-Chancery Court, a perpetual injunction was decreed; and hence the case is brought to this Court.

1. It is insisted, in the first place, on the part of the appellant, that the complainant was not entitled to relief in equity on the ground of the private nuisance; because relief in equity will only be granted in such cases where the mischief is irreparable and cannot be compensated in damages. Authorities are to be found holding this doctrine; but the modern and more approved cases extend the relief in equity much further, upon the just principle of interposing to prevent the evil, rather than to compensate for it after it has been committed. Thus it is held to apply to cases of diversion of watercourses, or pulling down banks, and exposing the complainant to inundation. Eden on Injunc. 269; 1 Bro. C. C. 588; 10 Ves. 194. In *Coulson vs. White*, 3 Atk. 31, Lord Hardwick said, "Every common trespass is not a foundation for an injunction, where it is only contingent and temporary; but if it continues so long as to become a nuisance, the Court interferes, and will grant

an injunction." Judge Story lays down the rule thus: in order to give the jurisdiction, he says, "there must be such an injury as from its nature is not susceptible of being adequately compensated by damages at law, or such as, from its continuance or permanent mischief, must occasion a constantly recurring grievance, which cannot be otherwise prevented but by an injunction." 2 Story Eq. Jur. § 925.

These principles fully justify the relief sought in this case. The inundations occasioned by the erection of the dam, the injuries thereby caused to the complainant's lands, and the periodical destruction of his timber, did not constitute a single trespass, but, from their nature, must have been "constantly recurring grievances." It would have been unreasonable and oppressive to force the complainant into a court of law to redress each repetition of the injury as it might recur from time to time; and therefore, on the very principle of "suppressing interminable litigation," and of "preventing multiplicity of suits," courts of equity alone can give just and adequate relief in such cases.

2. The appellant urges that the complainant was not entitled to an injunction on the ground of a public nuisance, because a private individual cannot come into a Court of Equity for relief from a public nuisance, unless he avers and proves some special injury; and that there is no such averment in this case. He contends, that the proper mode of proceeding is by indictment at law, or by information in equity, at the suit of the Attorney-General or the State. We do not think these positions well founded.

An indictment could only result in an abatement of the nuisance after it had been committed. It could not prevent the mischief arising from it before the indictment could be tried and the judgment carried into execution. That remedy would, therefore, be inadequate.

As to the right of the complainant to seek the relief, the bill states, that the health of the neighborhood would be greatly injured by the stagnation of water produced by the dam, and it shows that the complainant's lands lay within a short distance of it, and would be affected by it. His property, therefore, as a place of residence,

or as a plantation and abode of slaves, must necessarily have been injured; and this must strike the mind almost as forcibly as if it had been distinctly alleged in the bill, that this cause of disease would extend to him or his family or slaves, or would diminish the market value of his lands. But it appears, by the proof, that he resides upon the lands; so that it sufficiently appears he was subject to the evil complained of. It is well settled, that a private individual may obtain an injunction to prevent a public mischief, by which he is affected in common with others. *Eden on Inj.* 267. Judge Story says, a Court of Equity will interfere in such cases, "upon the application of private parties directly affected by the nuisance." 2 Story, Eq. Jur., § 924; 12 Peters, 98.

But here the matter is not only presented as a public nuisance, but it is also alleged that a special injury, apart from the mischief to the public health, would be sustained by the complainant, in the damage to his lands and timber. This will justify a private individual in seeking relief for a public nuisance producing special injury to himself. *Crowder vs. Tinkler*, 19 Ves., 622; 12 Peters, 98.

No objection is made to the sufficiency of the evidence to sustain the verdict, and it must be taken as correct and to support the allegations of the bill.

We are therefore of opinion that there is no error in the decree, and it must be affirmed.

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## ABSTRACTS OF RECENT AMERICAN DECISIONS.

*In the District Court of the United States, in and for the District of Maryland.*

HENRY KENDEPT vs. BARQUE THEODORE KORNER.

Libel in rem for seaman's wages.

The libellant was a citizen of Bremen, to which place the barque belonged. The libellant came to this port in another vessel belonging to Bremen, and was transferred from said vessel in this port, to the barque



Theodore Korner, to go a voyage to the Chincha Islands and elsewhere. On the return of the barque to this port, the libellant left her, and filed this libel to recover his wages. The District Court (Judge Giles) decided that by the terms of the treaty between our government and the Free Hanseatic Towns, this Court had no jurisdiction of the case; that the libellant must apply to the Consul for Bremen at this port, who is clothed with jurisdiction in all cases of dispute between masters of vessels and seamen, where the parties are citizens of Bremen.

The Circuit Court (Chief Justice Taney) affirmed this decree.

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*In the Circuit Court of the United States, in and for the District of Maryland.*

THE UNITED STATES *vs.* THE BRIG NEPTUNE AND OWNERS.

This was a libel in rem filed against the vessel, and in personam against the captain and owners, to enforce the penalties of the Act of 1848, passed in reference to passenger vessels.

The District Court (Judge Giles) decided that the said penalties could only be recovered by an action of debt on the common law side of the Court, and not by libel; and that the penalties were personal; and there was no lien on the vessel, and no remedy in rem, to enforce them.

Decree affirmed on both points on appeal, by the Circuit Court, (Chief Justice Taney.)

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*In the Superior Court of Chancery of Mississippi. June Sessions. Jackson, 1854.*

JAMES L. CALCOTE *vs.* FREDERICK STANTON AND HENRY S. BUCKNER.,  
Per GLENN, Special Chancellor.

1. *Choses in Action—Assignment.*—The fact that a claim is disputed, will not forbid its transfer or assignment, nor will public policy avoid such a sale because it may become necessary in the assignee to set aside the fraud of the debtor, in order to effectuate his purchase.

<sup>1</sup> The points decided in this case are here presented. The opinion was so long that we have been compelled to give the points only, carefully prepared by the Special Chancellor, Hon. D. C. Glenn, to whom our readers are indebted for this and other valuable contributions.—EDS. LAW REG.

2. *Champerty—Maintenance.*—The doctrine of Champerty and Maintenance is now only applied to the purchase of controverted titles, productive of naked litigation among persons claiming the same thing by different titles, and is only enforced in cases where there is an adverse right claimed under an independent title, not in privity with the assignor or seller, and not under a disputed right claimed in privity or under a trust for the assignor or seller.

3. *Estoppel.*—Where A publicly and on record admits himself indebted to B in a sum certain, and B in the same manner states the same fact, and upon such statement C parts with his money or other valuable thing in purchase of the debt, upon settled principles of justice A and B are estopped from denying the *existence* of this debt in the hands of C or his assignee.

4. *Partnerships—Bankruptcy—Creditors.*—When the same parties composed three distinct firms, at different places and under different names, the three firms were entirely separate and distinct from each other, and kept their business, books and accounts accordingly, upon the bankruptcy of all the firms, *held*, that the social creditors of one firm, in a Court of Equity, could enforce payment of a stated amount or balance due it from the other firms.

5. *Rule in Equity as to Partnerships.*—In Equity, all contracts and dealings between such firms of a moral and legal nature are deemed obligatory, though void at law; and in all such cases, Equity looks behind the form of transactions to their substance, and treats the different firms for purposes of substantial justice exactly as if they were composed of strangers or were in fact corporate companies.

6. *Equity—Jurisdiction—Assignment.*—(1.) Wherever a remedy is more full and complete in Equity than at Law, or from the subject-matter of a suit or the circumstances surrounding it, more full and perfect relief can be had in Equity than at Law, Equity will take Jurisdiction.

(2.) Where an equitable interest in a *chose in action* is vested in the holder by assignment, his rights will be enforced in Equity if there is no legal remedy, or the remedy at law is a doubtful or a difficult one.

(3.) Courts of Equity are not ousted of an original jurisdiction because the same has been answered by Courts of Law, or has been conferred upon the latter by statute.

7. *Certificate of Bankruptcy—Fraud.*—Bankruptcy is pleadable in bar to all actions and in all Courts, and this bar may be avoided wherever it is interposed, by showing fraud in the procurement of the discharge.

8. *Bankrupt Law of 1841—Fraud.*—A creditor of any class, whether he has or has not proved his claim against the bankrupt, whether he has or has not participated in the bankrupt proceedings, is not barred from suit or recovery on his claim when he can show that the discharge was fraudulently obtained, and that the bar is a nullity; *Provided*, he was ignorant of the fraud, and there were no circumstances which would justly put him upon inquiry, and he has not delayed action too long after coming to a knowledge of the fraud.

9. *Fifth Section—No Bar in case of Fraud.*—The 5th Section of the Act of 1841 did not intend that the proving of claims by creditors should effect an absolute abandonment of all claims against the future acquisitions of the debtor, but simply a waiver of all right of such creditor in Law or Equity, inconsistent with the bankrupt proceedings, in case the bankrupt should obtain a discharge which was not “impeachable for some fraud or wilful concealment of his property.”

10. *Law of 1841—Effect on Creditors.*—The Bankrupt Law of 1841 was a legislative confiscation of existing rights for the benefit of the debtor, with the privilege to the creditor to avoid the same for fraud on the part of the bankrupt when it became known to him.

11. *Statute of Limitations—Law and Equity.*—Courts of law are bound by the statute of limitations, and Equity also regards it, except in cases of fraud and pure trust, yet Courts of Equity are not within the statute, and never permit a plea thereof when conscience would be violated.

12. *Fraud—Concealment—Equity—Limitations.*—In cases where the party by fraud has kept concealed the rights of complainant, and has thereby delayed him in the assertion of those rights, lapse of time ought not upon principles of justice be admitted to repel relief. On the contrary, it would seem that the length of time during which the fraud has been successfully concealed and practised, is rather an aggravation of the offence, and calls more loudly upon a Court of Equity to grant ample and decisive relief.

*In the Supreme Court of Appeals of Virginia.<sup>1</sup>*

1. A negotiable note is signed R. H. E., for S. H. C., the latter name being within brackets, On the face of the paper it is the note of R. H. E. *Early vs. Wilkinson & Hunt.*

2. The father of an infant child being dead, the mother is entitled to its custody as of right; and she does not lose this right by a second marriage. But where she is seeking by the writ of *habeas corpus* to have the child placed in her custody, the Court may exercise its discretion, and determine whether, under the circumstances, it is best for the infant that he should be assigned to the custody of the mother. *Armstrong vs. Stone & Wife.*

3. Testator devises his real estate to his wife for life, remainder to his son J.; and bequeaths his personal estate to his eight children. The wife renounces the will, and takes her third of the real and personal estate. The two-thirds of the real estate, devised to the wife for life, is to be rented out, and the proceeds applied to satisfy the legatees of the personal estate for the one-third of that fund taken by the wife; and upon their satisfaction, or the death of the wife, whichever event shall first happen, the said two-thirds of the real estate passes at once to the remainderman J. *McReynolds vs. Countz et als.*

4. In the penal part of a bond the names of fourteen obligors are inserted, binding themselves in a penalty to T. The condition recites that T has admitted the above bound his deputies in the office of sheriff of G county for twelve months. Now, if the above bound shall well and truly discharge the duties of their respective offices of sheriffs as aforesaid, &c., the names of the parties who were admitted as deputy sheriffs being omitted. Two of the persons whose names were inserted in the penal part of the bond did not sign it; and one signed the bond, whose name did not appear in the body of the instrument. On a motion by the administrator of T, the high sheriff, for the default of one of the fourteen who had signed the bond, as deputy high sheriff. *Held,*

1st. That there being nothing on the face of the bond to indicate that all named in the penalty were not appointed as deputies, and the obligors having sealed and delivered the bond in its present form, they are estopped from denying the fact.

2d. The deputy sheriffs having no joint interest in or authority over the the whole office, and, therefore, one not being responsible for the other

<sup>1</sup> The Reporter has kindly furnished us with these abstracts. The cases themselves will be found in 9th Grattan's Reports.

merely by virtue of the office, they can only be held liable for the acts of each other in consequence of an express understanding. As, therefore, they do not and cannot be made to stand as principals in respect to the acts of others, each one must be regarded as principal so far as his own acts are involved, and the remaining obligors are his sureties.

3d. Though some of the persons named in the penalty did not sign the bond, the parties who did sign it are to be considered as the obligors who are bound, and are recited to have been admitted as deputies.

4th. A party signing the bond, whose name is not in the penalty, does not vitiate the bond, and he is bound as an obligor. *Cox and others vs. Thomas' Administrator.*

5. The Circuit Court is a Court of general jurisdiction, taking cognizance of all actions at law between individuals, with authority to pronounce judgments, and to issue executions for their enforcement. Where its jurisdiction is questioned, it must decide the question itself. And whenever the subject matter is a controversy at law between individuals, the jurisdiction is presumed from the fact that it has pronounced the judgment; and the correctness of such judgment can be inquired into only by some appellate tribunal. *Id.*

6. Two deeds are made by an old man shortly before his death, by which he conveys the whole of his property which he had not before disposed of, to one of his sons. *Held,*

1st. That the principle which has been applied to last wills, in respect to the state of mind and degree of capacity sufficient to make a valid devise or disposition of property, is equally applicable to the case of this grantor.

2d. The grantor not laboring under a total or temporary deprivation of reason, he was of legal capacity to make a valid disposition of his property, if he was capable of recollecting the property he was about to dispose of, the manner of distributing it, and the object of his bounty.

3d. Although the grantor or testator may labor under no legal incapacity to do a valid act or make a contract, yet if the whole transaction taken together with all the facts, mental weakness being one of them, shows that the particular act was not attended with the consent of his will and understanding, it is void. *Greer vs. Greer.*

7. In an action at law, the defendant is prevented by unavoidable accident from setting up offsets which he held against the plaintiff; these offsets being in no way connected with the debts sued upon. He is not entitled to enjoin the judgment and set up his offsets against it, but must pursue his remedy at law for their recovery. And if the claims which he

holds against the plaintiff at law, are only recoverable in equity, still he is not entitled to enjoin the judgment, and have them set off in equity.

*Hudson vs. Kline.*

8. A vendee of land being entitled to come into equity to enjoin a judgment recovered by an assignee of a bond given for the purchase money, on the ground of difficulties in the title, and it being doubtful whether he can get a title; though the title is decreed to him in his suit, he is entitled to set up in equity offsets he held against his vendor prior to the assignment; and he was not bound to plead them at law. *Bagsdale vs. Hagy and others.*

9. A sells to B a number of slaves at a price much below their value, for the purpose of defrauding his creditors. B executes to him her bonds for the purchase money, and he assigns the bonds to bona fide creditors; and soon thereafter dies. B sells a part of the property, and pays off the bonds, and then conveys the remainder of the property to the widow and child of A. Upon a bill by other creditors of A to set aside these deeds as fraudulent, they are set aside, and the property conveyed in the last of them is sold, and the proceeds are applied to pay the claims of the creditors. All the creditors of A not being satisfied out of this fund, B is held liable to satisfy them to the extent of the price of the slaves sold by her. *Williamson's Executor vs. Goodwin et als.*

10. S by his will emancipated his slave at a specified future period; provided she shall leave the State within six months thereafter. But if she does not leave the State within the six months, then she is to become a slave to his estate forever. And provided, that the laws of the State shall so require her to leave it. *Held*, That the condition is void; and she is free, though she does not leave the State within six months after the time specified. *Forward's Administrator vs. Thamer.*

11. Testator by his will says: "Whenever my executors think best, they shall sell my land in B, together with all the personal estate thereto belonging, except the slaves; and reserving one hundred and fifty acres of said land, which, with one-fourth of the said slaves, they shall hold in trust for the benefit of my daughter N. B.," &c. "The money arising from the sale of the land and other property above mentioned, together with all other moneys remaining in the hands of my executors, after payment of debts and legacies; also the remaining three-fourths of my slaves belonging to my said plantation, I desire shall be equally divided between my son B and my daughters M and J." *Held*, The will does not confer on the executors a naked power; but it vests in them an interest and a trust, and

it is their duty to take possession of the land and to account for the rents and profits until it is sold. *Mosly's Administrator et als. vs. Mosly's Administrators.*

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*In the Supreme Court of Alabama, January Term, 1854.*

1. An infant is *in esse*, for the purpose of taking an estate for its benefit, from the time of its conception, provided it be born alive and after such a period of foetal existence that its continuance in life may be reasonably expected. *Nelson vs. Iverson.*

2. An action on the case lies against the owners of a steamboat to recover damages for the loss of a slave who was hired as a deck hand on the boat, and was killed in consequence of a collision with another boat; if his death was the legitimate and natural consequence of the collision, and the collision was caused by the negligence and want of skill of the boat's officers. (*But note that the captain was one of the part-owners.*) *Cook & Scott vs. Parham.*

3. It is the duty of the owners of the boat to use due care in providing competent officers for her; and the owner of the slave may hold them responsible for the neglect of this duty, although he had the means of knowing the officers' character for skill and care when he hired his slave to them. *Ib.*

4. If the slave's death was caused by his own act, in leaping into the river when frightened out of his ordinary presence of mind by the excitement, confusion and danger produced by the collision, it would be the legitimate consequence of that collision, and the defendants would be liable. *Ib.*

5. When an agent pays the money of his principal to a person who is not authorized to receive it, the principal may sue the receiver in assumpsit, for money had and received; but the bringing of such an action is a ratification of the payment, and discharges the agent from all further responsibility. *Van Dyke vs. The State.*

6. The General Assembly, by a joint resolution of both houses during its regular session, having adjourned on the 20th of December, 1853, to meet again on the 9th of January, 1854, a member who went home and returned during the recess, was held entitled to mileage, but not to *per diem* compensation during the recess. *Ex parte Pickett.*

7. When the act incorporating the municipal authorities of a city makes it their duty to keep in repair the streets and bridges within the corporate

limits, and in consideration thereof relieves them from other duties, an action on the case lies against them for a neglect of this duty, in favor of a person who is thereby injured. *Smoot vs. The Mayor, Aldermen, &c., of Wetumpka.*

8. A legislative grant to an incorporated company, conferring upon them "the exclusive right and privilege of conducting and bringing water for the supply of the city for the term of forty years," gives them no right to divert the water of a running stream, to the injury of riparian proprietors, without making compensation. *Stein vs. Burden.*

9. A municipal corporation, owning lands on a water-course from three to five miles distant from the city, has no right to divert the water from the stream, to the injury of other riparian proprietors, in sufficient quantities to supply the domestic wants of its inhabitants. *Ib.*

10. A riparian proprietor is entitled to nominal damages for a diversion of the water from his mill, without any proof of actual damage. *Ib.*

11. The uniform and uninterrupted diversion of water from a running stream for a period of twenty years, gives a title by prescription. It is not necessary that the water should be used in precisely the same manner, or applied in the same way; but no change is allowed which would be injurious to those whose interests are involved. *Ib.*

12. The points ruled in this case were re-affirmed in the case of *Stein vs. Ashby*, at the same term.

13. When justification and the general issue are pleaded to an action of slander, if the defendant fails to establish the former plea, it may be considered by the jury in aggravation of damages. *Robinson vs. Drummond.*

14. A deed which is void as to third persons on account of an adverse holding, is nevertheless binding and valid as between the parties themselves; and the fact that the vendee himself was in possession, as tenant of the adverse holder, does not affect the principle. *Abernathy vs. Bouzman.*

15. On questions of insanity, a witness whose acquaintance with the party has been such as to enable him to form a correct opinion of his mental condition, may not only depose to facts conducing to establish unsoundness of mind, but may also, in connection with those facts, give his own opinion upon the question of sanity or insanity. *Floreys' Executors vs. Florey.*

16. Fraud, or undue influence, in procuring one legacy, does not invalidate other legacies which are the result of the testator's own free will;



but if the fraud or undue influence affects the whole will, though exercised by only one legatee, the whole will is void. *Ib.*

17. An insane delusion, existing in the testator's mind at the time of the execution of his will, as to the principal legatee being his son, renders the will void, if it is the offspring of that insane delusion. *Ib.*

18. Where the principal legatee, who was born in lawful wedlock two or three years after his mother's marriage with the testator, bears the peculiar, distinctive marks of the negro, while his mother and the testator were white persons of fair complexion, the testator's belief that the legatee was his son, is admissible evidence, in a contest touching the validity of the will, for the purpose of showing mental delusion on this particular subject. *Ib.*

19. A transcript from the records of a foreign court, whether of general or special and limited jurisdiction, is admissible evidence in the courts of this State, if properly authenticated; and our courts are bound to presume that the foreign court had jurisdiction of the subject-matter upon which it professes to adjudicate, until the contrary appears. *Slaughter vs. Cunningham.*

20. The husband is liable, in assumpsit, for necessities furnished to his wife (she being separated from him without fault on her part) while confined in a lunatic asylum, although the credit was given to the person who, as agent for plaintiff, made the contract and paid the expenses, which were afterwards repaid to him by his principal; but if the person who made the contract was acting for himself individually, and not as agent of the plaintiff, the latter cannot, by voluntarily paying the debt, make the husband his debtor. *Wray vs. Cox.*

21. The husband is liable, in assumpsit, for necessary medical attendance on his wife, although the physician was called in against his objection, by his grown son, who lived with him, and who promised him to assume the payment; it being shown that the husband was present while the physician was rendering his services, and that the latter had no notice whatever that he was not to look to the husband for payment. *Cothran vs. Lee.*

22. An incorporated town retains its corporate capacity until its charter is declared forfeited in a direct judicial proceeding; it cannot be held, in any collateral proceeding, to have forfeited its charter by non-user. *Harris vs. Nesbit.*

23. A bond for title, given by an infant, is not absolutely void, but voidable only; and if the infant after attaining his majority, disaffirm the

contract and sue his vendee for use and occupation, the latter may recoup for valuable improvements erected on the land. *Weaver vs. Jones.*

24. A written order addressed to a mercantile firm in these words: "Please let the bearer, Mr. O., have any little things he may stand in need of, and I shall be good for the same:" *held* to be a direct original undertaking which would continue until revoked, or until the account was closed, and would embrace any articles of no great value, which would come under the denomination of necessaries for a person in O.'s condition. *Scott vs. Myatt & Moore.*

25. The owner of certain slaves being about to remove with them to Illinois for the purpose of emancipating them, conveyed them by absolute bill of sale to another, and took from him at the same time a bond conditioned that he should emancipate them when reasonable compensation had been made to him for his trouble and expenses with them: *held*, that inasmuch as there was nothing on the face of the bond requiring the obligor to emancipate the slaves *in this State*, his undertaking was not void, but formed a sufficient consideration for the bill of sale. *Prater's Administrator vs. Darby.*

26. The constitutional delegation of authority to the legislature "to pass laws to permit the owners of slaves to emancipate them," is not an inhibition of the owner's right to emancipate them except only under such regulations as the legislature may prescribe. *Id.*

27. Certain boundaries are of more importance than quantity, in designating lands. Therefore, where a patent calls for a subdivision of a fractional quarter section, described as lying north of a certain creek, and containing a specified number of acres, it embraces all the land in the subdivision north of the creek, although the actual number of acres exceeds the number specified in the patent. *Stein vs. Ashby.*

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*Points decided by the Supreme Court of Massachusetts, for the County of Suffolk, at the March Term, 1854.*

[From 1 Gray's Reports, now in press.]<sup>1</sup>

1. *Can a Sheriff, in a criminal proceeding against him, be committed to his own Jail?*—This general question is discussed by the Court; and it is decided that a warrant to a Coroner to commit the Sheriff to the county jail of which, and of all the prisoners therein, he has by statute the cus-

<sup>1</sup> We are under obligations to Mr. Gray for the loan of the sheets in advance, from which we have digested these points. We understand that the first part of this volume will shortly be published.

tody, rule, and charge, is void; and the court will, on *habeas corpus*, discharge the sherrff held by the coroner on such a warrant. *Adams vs. Vose*, page 51.

2. *Burden of proof in Criminal Cases.*—A party indicted for assault and battery, contended at the trial that the battery was justifiable in self defence; and the court held, that the burden of proof was not on him to establish the justification, but on the government throughout. The ground of the decision was, that the government sets up an *unjustifiable* beating; which is the issue the defendant has to meet. The order of proof, and the side by which the witnesses are called, are immaterial; and the defendant may all along require that the case be fully established against him. "There may be cases," said Bigelow, J., in delivering the opinion, "where a defendant relies on some distinct, substantive ground of defence to a criminal charge, not necessarily connected with the transaction on which the indictment is founded, (such as insanity, for instance,) in which the burden of proof is shifted upon the defendant. But in cases like the present, (and we do not intend to express an opinion beyond the precise case before us), where the defendant sets up no separate, independent fact, in answer to a criminal charge, but confines his defence to the original transaction charged as criminal, with its accompanying circumstances, the burden of proof does not change, but remains upon the government to satisfy the jury that the act was unjustifiable and unlawful." *Commonwealth vs. McKie*, page 61.

3. *Void and voidable executions.*—This distinction was discussed, and the court held that an execution, issued while the judgment debtor is imprisoned under a commitment on a prior execution, upon the same judgment, is void; and a sale of property under it, though made after the debtor's discharge from imprisonment, and to a purchaser without notice, passes no title. *Kennedy vs. Duncklee*, page 65.

4. *Civil suit against a felon.*—It was held, that the English rule that no civil suit lies against a felon for goods feloniously taken, until after a criminal prosecution has been instituted, is not in force in Massachusetts. This is an exceedingly well reasoned case upon a point on which there is great diversity in the American authorities. *Boston and Worcester Railroad Corporation vs. Dana*, page 83.

5. *Age of consent to matrimony—Construction of Statute.*—The court recognized the common law rule, that the age of consent is twelve in females, and fourteen in males. Also held, that the statute, which renders it penal for magistrates and ministers to solemnize marriages between minors, with-

out the consent of their parents, does not render void marriages solemnized contrary to its directions. These, it may be observed, are questions upon which there is no diversity in the authorities. *Patton vs. Hervey*, p. 119.

6. *Title by estoppel—Covenants of warranty.*—Where one, who has made a deed with full covenants of warranty, purchases, after eviction of his grantee, the paramount title, such title will not, without the grantee's consent, so enure to the latter by way of estoppel, as to defeat his right of action on the covenant against incumbrances, or reduce the amount of damages, which will be the consideration money paid, with interest. *Blanchard vs. Ellis*, page 195.

7. *Railroads as common carriers.*—Proprietors of a railroad who transport goods over their road for hire, and without additional charge deposit them in their warehouse until the owner or consignee has a reasonable time to take them away, are not, without negligence or default, liable as common carriers for the loss of the goods by fire, after they are unladen from the cars and placed in the warehouse; but are liable as warehousemen only for want of ordinary care; although the owner or consignee has no opportunity to take the goods away before the fire. *Norway Plains Company vs. Boston and Maine Railroad*, page 263.

8. *Estates tail.*—A devise to one, and the heirs of his body, "and to their heirs and assigns forever," creates an estate tail, which, in Massachusetts, as at common law, descends to the oldest son, and to the oldest son of the oldest son. *Wight vs. Thayer*, page 284.

9. *Promise to one to pay a third person.*—On a promise made by the purchaser to the vendor of an equity of redemption, and recited in the deed of the equity, to assume and cancel the mortgage on the premises, with the note it was given to secure, no action lies by the mortgagee. A suit can only be maintained by the vendor, to whom the promise was made. *Mellen vs. Whipple*, page 317.

10. *Lessee and his assignee.*—The assignee of all a lessee's interest in and to the lease may recover rent subsequently accruing, of one to whom such lessee has previously hired a portion of the demised premises for the whole term, and who occupies it accordingly, in (under the new Practice act of Massachusetts) an action of contract, without setting forth in his declaration the assignment from the original lessee to the defendant. And the defendant in such action is estopped to deny the estate of the original lessor in the premises. *Patton vs. Deshon*, page 325.

## LEGAL MISCELLANY.

## LAW IN THE UNITED STATES.

The difference in both the study and the practice of the law, between the United States and England, is very considerable, and it is becoming greater every day. In England, the lawyer goes to his books for *authority*, but in this country we have comparatively little that is, in the strict sense, authority. Nothing, in fact, is such, but the decisions of the highest tribunal of one's own state, and of the United States. For, in regard to the adjudications of the English Courts, before the settlement of this country, there is always room, theoretically at least, for the doubt, whether our forefathers brought with them a particular doctrine, as adapted to their altered relations and circumstances, while the mass of the law now administered in the Courts at Westminster, was settled at a later period; and it is not, therefore, strictly conclusive upon us. Then we have already reported in this country, more cases than are found in the English books; we have thirty-one states, and no tribunal is obliged to follow the decisions in a sister state. Yet all these cases that are not absolutely binding, have a weight as *quasi* authority. And no practitioner can properly or safely appear before a Court on any question of difficulty in the law, without referring to all the English and American decisions that bear upon the point.

When we consider the accumulation of reports, that the next fifty, not to say five hundred, years will produce, it is not difficult to see that to keep track of all the reported cases, will be a severe tax upon the exertions of those gentlemen in the profession, who spend their choicest hours in smoking cigars, or lounging at the country inn. And not only to those gentlemen, but to many youths of pretty sober habits, the prospect must look somewhat appalling.

Now, what is to be done about it? In the first place, those to whom the Lord has never given brains, will do best to leave the law, and seek some other calling. The profession thus cut down to the *paying point*, let each remaining man strip the ruffle from his shirt-bosom, and go to work. Let him feel below the rubbish of

cases for the solid timber of *principle*, and from such material by such men, let the fabric of our future American Jurisprudence be reared.

To be more precise, lawyers must arrange and argue their cases more upon principle, not, however, to the neglect of authorities; and judges will, as a necessary consequence, ground their decisions more upon principle. The writers of our text books must give us principles, supporting them by cases, only as spiles buried in the earth support the structure above that is to be seen and used. In this way, the law will become an instrument of the highest culture to its practitioners; and, although a competent knowledge of it will then, as now, be unattainable in a day, yet it will be quite within the reach of the human intellect for all future time. Our jurisprudence will become, in some respects, more like the European, but vastly better, departing essentially from the technical and unscientific form it wears in England. But if we follow strictly the English track, we shall find it, not tolerable, as there, but owing to our very different circumstances above adverted to, utterly intolerable. The only way of deliverance, open to us in such a case, will be that of codification, which, however good in itself, would not be good laid on such a foundation.

Another consideration is important, because it is practical. If we leave the future entirely out of view, no lawyer, even at the present time, can do himself credit, or his client the highest service, or open for himself a position of eminence in the profession, unless he studies and argues his cases upon principle. Nor can he do this, unless he makes the principles of the law, in every department, a subject of constant meditation and research. Authority is good and indispensable, but not "good to be alone;" it should always be found wedded to principle.

J. P. B.

## NOTICES OF NEW BOOKS.

Reports of Cases argued and determined in the Supreme Court of the State of California, in the year 1852. By H. P. Hepburn, Reporter for the Court. Vol. II. Philadelphia: T. & J. W. Johnson, Law Booksellers, No. 197 Chestnut st.

These reports present to us decisions which have settled questions involving property of immense value, suddenly discovered, and acquired under circumstances entirely novel.

The emigrants from the Atlantic States in 1849, found California in the possession of a people, living with their herds in patriarchal simplicity, and governed by the Civil Law and the legislation of Mexico. In 1850, a people of high civilization, boundless ambition and energy, with a system of Law entirely different, controlled California; and at the same time, pastoral life disappearing, cities and the arts, the fruits of her mines, covered the land. Not unexpectedly, therefore, we find in these Reports cases of unusual difficulty and interest.

We will cite a few of the cases which have especially interested us:

*Fowler vs. Smith*, pages 39 and 569, raises the question, whether the Civil or Common Law governed contracts made after the acquisition of California, and prior to the repeal of the former, and adoption of the latter by the Legislature.

Mr. Chief Justice Murray, dissenting from the majority of the Court, contended with great learning, that the law of the acquiring country became immediately the law of the acquired country, from the necessity of the case, in California, where, to use his forcible language, "in a few months, the emigration from older States exceeded five times the original population of the country. A State government was immediately formed to meet the wants of this unexpected population. The whole world was amazed by our sudden progress; and even the Federal Government, startled from her usual caution by so novel a spectacle, beheld us take our place as a sovereign State, before her astonishment had subsided. Emigration brought with it business, litigation and the thousand attendants that follow in the train of enterprise and civilization. The laws of Mexico, written in a different language, and founded on a different system of jurisprudence, were to them a sealed book. The necessities of trade and commerce required prompt action. This flood of population had



destroyed every ancient land-mark, and finding no established laws or institutions, they were impelled to adopt customs from their own government."

The judgment of the majority of the Court was pronounced by Mr. Justice Haydenfeldt. His opinions in this and numerous other cases throughout the book, bear intrinsic evidence that they are the work of an accomplished lawyer, whose mind, though subtle, is not misled into over-refinement, but seizes the strong points of a controversy, and disposes of it with a just logic.

*Billings vs. Billings*, page 107, and *Smith vs. Morse*, page 524, are decisions upon the validity of deeds of trust for the benefit of creditors. At this time when such deeds are of frequent occurrence, and Courts are conflicting in their views on the subject, these decisions are valuable additions to the stock of learning.

*Smith vs. Morse* is a most important case. It involves millions of dollars of property, and the power of corporations and legislatures are here elaborately discussed.

In *De Witt vs. San Francisco*, page 289, it appears that the city of San Francisco was about to purchase and hold certain real estate in common with the county, for municipal purposes.

After a clear and critical examination of all the points taken in the argument of the cause, Mr. Justice Wells, in an able opinion, decided that the proposed purchase was proper and legal. This is an important case; the more so, as it contains the only judgment pronounced by Judge Wells, since elected by the people to the Supreme Bench, and who has given therein good earnest of what may hereafter be expected of him.

*In re Perkins*, page 424, slavery, emancipation, fugitive slaves and legislative acts on the subject, are the topics of inquiry.

Unfortunately those topics are pregnant with angry national agitation. It cannot be expected, therefore, that the opinion of this or any Court, can calm the turbulent elements of excitement, although the argument here reported covers every minute point, and seems to leave nothing more to be said on the subject. This cause, being a judicial exposition by a tribunal of high authority, of the most important question that ever agitated this country, will be read with interest throughout the Union.

In closing our review of this volume, we remark that it embraces a great variety of legal learning, in which the labors of the bench have been well supported by the bar, whose arguments have been presented with



ability, evincing that the large professional rewards in California, have called into the service of the profession many of its eminent members.

The reporter has discharged his duty in a neat, concise and masterly manner. The points in the several cases are lucidly stated, and the whole style and arrangement of the book is creditable. It is handsomely printed and well bound.

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Cases in the Circuit Court of the United States for the Third Circuit. Reported by John William Wallace. Vol. II. Philadelphia: T. & J. W. Johnson. 1854. pp. 616.

This volume is quite as interesting, and contains as many, perhaps more cases of permanent interest and importance, than the first volume. We have read it with undiminished pleasure, and would gladly give our readers a full and extended notice, did our limits permit. We have already presented, by the kindness of the reporter, many of the principal points. In *Krebs vs. The Bank*, p. 49, will be found an excellent note on the vexed question as to the nature, effect and value of a judgment affirmed from necessity, in a Court of Error, by an equally divided Court. And in *Cromwell vs. The Bank*, p. 589, a vivid but sad picture of the manner in which solemn judicial records, involving many interests, are kept, or rather neglected. The cases which will probably attract the most professional attention are *Smith vs. The Creole*, p. 485; *Hanway's Case*, p. 139; *Stowe vs. Thomas*, p. 547; *Aspden's Estate*, p. 368; *Grubb vs. Bayard*, p. 31; *Goodyear vs. Day*, p. 283, and *Jones vs. The Ins. Co.*, p. 278.

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Commentaries on the Jurisdiction and Peculiar Jurisprudence of the Courts of the United States. Vol. I. Containing a view of the judicial power and the jurisdiction and practice of the Supreme Court of the United States. By George Ticknor Curtis, Counsellor at Law. Philadelphia: T. & J. W. Johnson. 1854. pp. 635.

We have already called the attention of our readers to this valuable and comprehensive work. This volume is devoted to one of the most important and practical inquiries that can engage the attention of the Bar, the judicial power of the Federal Courts. A more extended knowledge of the principles, practice and mode of procedure in these Courts, has been greatly needed by the profession, and such learning has, by Mr. Curtis, been, for the first time, elaborated and put within our reach. The very latest authorities are all given, and copious and able commentaries made upon disputed questions. Nowhere is so careful an inquiry to be found as to Admiralty Jurisdiction, as in B. I. ch. 3, p. 33, et seq. Book II discusses the Original and Appellate Jurisdiction carefully and fully. We can do no better office for our readers than send them to the volume itself.

THE  
AMERICAN LAW REGISTER.

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DECEMBER, 1854.  
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GROUND RENTS IN PENNSYLVANIA.

No. II.

As ground rent deeds are usually drawn at the present day, the owner of the rent has three remedies for the recovery of the arrearages—viz: by action, distress, and (for want of sufficient distress,) the right to re-enter and hold as of the grantor's former estate.

The progress and the reasoning of the decisions relating to these several remedies, as they affect the right of the owner of the rent to recover the arrearages, either with or without interest from the time each payment becomes due, as he should resort to the one remedy or the other, or as the deed should give one or all of them, as also the extent of his rights when they come into conflict with other lien creditors, or when there has been a judicial sale of the land without satisfaction of the arrearages, is somewhat curious.

The leading case upon this subject is that of *Battleon vs. Smith*, 2 Binn. 146, decided in December, 1809. In this case the owner of the rent brought covenant for the arrearages; the land was sold upon his judgment and the proceeds brought into Court. The plaintiff moved to take out of Court his debt, interest, and costs—claiming interest on each payment from the time it fell due to the time

of the sale. There were judgments prior to the plaintiff's *judgment*, but subsequent to the reservation of the rent, sufficient to absorb the fund. The plaintiff claimed priority. The ground rent deed contained the grantee's covenant to pay the rent; a power to enter and distrain, and for the want of sufficient distress to hold the land *until the arrearages were fully paid*; but no power to enter and hold as of the grantor's former estate. The plaintiff was *held* entitled to the principal of the arrears, out of the fund, but not to interest—and this in preference to the other claimants.

Against the plaintiff's claim to priority it was argued—First, That by resorting to the personal remedy against the grantee by action of covenant, the *land* was totally discharged from the rent. And if not so then, *secondly*, that the remedies given by the deed were not cumulative, but alternative. That the plaintiff might have distrained; or for want of sufficient distress might have entered and held; or he might resort to the person of the grantee. But he could not enter if there was a sufficient distress; nor pursue the covenant to judgment and then distrain for satisfaction. That the lien of the landlord for his arrears is founded exclusively upon his right to distrain and for want of sufficient distress to re-enter; that if the right is gone he stands upon the footing of a common creditor; that if the *rent* is extinguished, the rights of distress and re-entry are extinguished also. And that the rent was extinguished by merger in the *judgment*, which was to be levied by execution and took its rank among other judgments solely from its date. That interest, at any rate, could not be recovered, *first*, because rent itself is interest; and *secondly*, the landlord should have made a demand on the land, and he had the means of preventing delay, and moreover, in this case there was no penalty by which the tenant could forfeit his estate; the rule being that if the tenant forfeits his estate at law, and the landlord exercises his right of entry, the tenant being forced to ask equity, might be laid under terms.

For the plaintiff it was contended that the land itself having been liable in the first instance for the arrears, he was entitled to the same priority out of the proceeds. That the plaintiff had three remedies; distress, entry and covenant, and he might use them all.

until he obtained complete satisfaction. That the remedy by distress, or by entry for want of distress, was not affected by the judgment in covenant—the judgment may alter the security, but it was no satisfaction; it was no extinguishment of the original security unless it produce the fruit of a judgment, and the plaintiff's rights were therefore the same as they would have been if he had obtained no judgment himself, but the land had been sold under the judgment of another; in which case there could be no doubt, it was said, his lien would still continue, and he would be entitled to prior satisfaction out of the proceeds. That interest should be allowed because it was due upon all liquidated sums from the instant the principal becomes payable, either as damages for delay, or as compensation for the use.

Chief Justice Tilghman, who delivered the opinion of the Court, laid it down that the action of covenant for arrears of ground rent was not like the writ of annuity, which was a mere personal remedy, and by resorting to which, as in the case of a rent charge, the party made his election to bind the person exclusively, and thus discharged the land from all further liability; but that in the case of covenant for ground rent the land was not discharged. That the remedies were cumulative, and a resort to one did not exclude a resort to the others until satisfaction. That the judgment in covenant, therefore did not extinguish the rent; “but the rent still exists, or in other words, there still exists a debt on account of the arrears of rent;” that the land remained charged with the rent notwithstanding the judgment; and the plaintiff was entitled to receive the arrears out of the fund, in preference to the other claimants, but without interest.

As we understand the reasoning of this case, it is, in substance, this: The judgment had not destroyed the lien of the arrears of rent—this continued to exist, independently of the judgment.

That such is the case is proved by the fact that notwithstanding the judgment, the arrears could be recovered by the other remedies provided by the deed. This independent lien of the rent existing, the plaintiff was entitled *by virtue of it*, and not by reason of the judgment, to come in upon the fund and receive the amount of his

*arrearages*, to the exclusion of those whose liens were subsequent to the lien of the *arrearages*: viewing the case as though the fund in Court had been raised by a sale under the judgment of a stranger.

The Court, attaching no importance to the fact that the fund was the fruit of a sale upon a judgment for arrears of the rent, nor basing the right of the plaintiff to a relation back of the lien of the judgment, and awarding to him the arrears upon that judgment, but simply and exclusively upon the independent lien of the rent. If this is a correct view of the principle upon which this case was decided—and it is to be inferred that the lien of the judgment does not relate back to the creation of the rent—the principle, we submit, is unsound, because if the latter were the case, estates and mortgages coming within the Act of April 6, 1830,<sup>1</sup> brought into existence subsequently to the creation of the rent, would not be divested by the sale for *arrearages*, which is contrary to the well settled law.

As to interest upon the arrears, the Court confined their opinion to the case before them, and thought the plaintiff not entitled, because, in that case, he had resorted to the land only, and the Chief Justice says: “If a man distrain for rent, he must distrain for the precise sum due. He cannot add interest to the arrears. If the plaintiff had entered on the land by virtue of the power in this deed, he could only have held till the arrears were paid. We do not say how the case would be, if the deed gave him power to enter and hold as of his former estate; for, in that case, his former estate in fee, being revested in law, the defendant would be driven to equity for relief, and in equity it might be thought reasonable to relieve on terms of paying interest.” And this question is declared open for discussion when it should arise.

Here, interest was denied upon the peculiar covenants of the deed. The only clause which enabled the plaintiff to re-enter and *hold the land*, determined that holding upon the payment of the *arrearages* merely. This being all he was entitled to upon re-entry, and he having resorted to the land, he was held entitled only to what he could have obtained by re-entry—intimating that a princi-

<sup>1</sup> Pamp. Laws, 1830, page 293.

ple of equity might have been invoked, and the result might have been different, had the deed contained a clause of re-entry *as of the grantor's former estate*.

This case is referred to by all the subsequent cases as the leading authority upon this subject, and as settling the right of the owner of the ground-rent to be paid his arrearages out of the fund derived from a judicial sale of the land, and this in preference to lien creditors claiming under liens subsequent in date to the creation of the rent. Upon the argument of this case, however, the manuscript case of *Potts vs. Rhoades*, decided in the Court of Common Pleas for Philadelphia, by Biddle,, P. J., in which the law was held the same way, was cited by counsel, and referred to in the opinion of the Court as entitled to great weight.

The next case was that of *Sands vs. Smith*, (3 W. & S. 9,) decided at December Term, 1841. There had been a sale of the land under a mortgage. Subsequently a distress was made upon the land for arrears of rent which had principally accrued prior to the sale, with interest upon the arrearages, and the goods were replevied. The deed contained a covenant by the grantee to pay the rent, and the clause of distress; but gave no right of re-entry either to hold until the arrears were paid, or to hold as of the grantor's former estate. The land was granted in fee, but the rent was reserved for a term of years, to commence after the lapse of seven years from the date of the deed. The cause came before the Court below upon a case stated, and judgment was given for the plaintiff in replevin. This judgment was reversed in the Court Above, where it was held that the defendant was at liberty to distrain for the arrears due at the time of the sheriff's sale.

Chief Justice Gibson delivering the opinion of the Court, says he "never understood on what principle of lien the case of *Bantleon vs. Smith* was decided," but declares it "not to be his purpose to disturb, or cast the least shadow on its authority, or to do more than show that it is not founded in any principle of lien peculiar to the reservation of a ground rent which it is necessary to carry out further than the decisions have already carried it." The Chief Justice then alludes to the case of *Nichols vs. Postlethwaite*,

(2 Dall. 131,) in which a legacy charged on land was allowed to be taken out of the price of it in the sheriff's hands, and says that this, as well as all others of the same stamp, depend for their authority exclusively on precedent, and their very great convenience, as well as on the policy of giving the sheriff's vendee a clear title, when it is practicable. But that neither policy nor convenience will justify an extension of the principle of them to the price of land which was not liable to be reached for the debt; and that in all of the precedents the money was not only charged, but there was a means of subjecting the land to the payment of it. He then adverts to the fact that in *Bantleon vs. Smith*, the deed contained a clause of re-entry by which the land itself might have been seized, and the produce of it applied to the payment of the rent; and also that in *Nichols vs. Postlethwaite*, the land might have been sold on judgment and execution for the legacy, and suggests that it was, perhaps, the difficulty of reaching it in either of those ways, which induced the Courts to apply the proceeds of it when turned into money. He then asks, "Now, what is the remedy by distress—the only one provided in this conveyance?" And he answers, "It is as much a personal one as an action on a covenant in the deed; it is even more so, as the land may be reached by such an action, while it cannot be reached by a distress, which operates merely on chattels found upon it."

It is true that in this case, as stated by Stroud, J. in *Western Bank vs. Willitts* (2 P. L. J. 46), the rent is reserved for a term of years, but the Court draw no distinction between such a case and an ordinary reservation in fee, and the whole scope of the reasoning treats the rent as an ordinary ground rent; and the case is discussed in reference to the authority of *Bantleon vs. Smith*.

The case, however, at first sight appears somewhat ambiguous, and this because so much stress seems to be put upon the allegation that there were no means provided by the deed of subjecting the land to payment of the rent. It proceeds upon the assumption that distress was the only remedy provided by the deed for the recovery of the rent; that there was no means thereby given for subjecting the land to the payment of it; that, therefore, there could

be no resort to the fund which was the proceeds of the sale of the land; and that where such was the case, at any rate, the right of distress, which was a totally distinct remedy from any looking to the land itself, remained unaffected by the sale.

The Chief Justice refers to the case of *Nichols vs. Postlethwaite* with apparent approbation, certainly without gainsaying it, and assigns as the probable reason why the Court, in that case, sanctioned a resort to the fund, that the land might have been *sold on judgment and execution* for the legacy. Now, in the very case of *Sands vs. Smith*, which the Chief Justice was deciding, precisely the same thing could have been done, for the remedy by distress was *not* the only one furnished by the deed, but the covenant to pay was there also, by means of which the land "might have been sold on judgment and execution" for the rent. It might, therefore, seem that if the Chief Justice intended to endorse the case of *Nichols vs. Postlethwaite*, upon the ground named by him, he must have overlooked the facts in *Sands vs. Smith*, and the reasoning upon which the decision in the latter case is based would be, therefore, erroneous. But we do not think this a correct view of the case. The Chief Justice adverts to the fact that in all the precedents the money was charged on the land. In *Nichols vs. Postlethwaite*, although the legacy was not expressly charged upon the land, yet it was thus charged by operation of law, and the judgment and execution would have been but the means of reaping the fruits of this charge, whereas, in *Sands vs. Smith*, there having been *no right of re-entry* provided by the deed, the rent, as we shall have occasion hereafter to remark, was not a charge on lien upon the land, and an execution upon a judgment for such rent could be levied upon the land only in the same manner as it could be levied upon any other property of the defendant. In the one case the land was made debtor for the money, without regard to the judgment, and in the other it was not.

We have said *the reasoning* upon which the decision in *Sands vs. Smith* was based might seem erroneous, if the case of *Nichols vs. Postlethwaite* were sustained upon the ground mentioned; and we have said this because we are not prepared to affirm that the *result*



would have been different had the Court been of opinion that under the deed the owner of the rent could have resorted to the fund; (although the argument certainly leans that way) for the Court seems to intimate that, upon principle, whether the arrears of the rent be thrown upon the lien creditors, or on the purchaser, "the remedy by distress of chattels on the land is as accessible in the one case as in the other; and there is no legal necessity that the arrears should be taken out of the fund in Court." The doctrine of the case of *Bantleon vs. Smith* is, that the remedies are *concurrent*, and all may be pursued *until satisfaction*. Suppose, then, a resort to the fund without any, or without complete satisfaction—does not the right of distress still exist for the whole in the one case, and the balance in the other? Nay, further, is not the doctrine of this case broad enough to sanction the idea that, though the deed contains all the usual covenants, there is no obligation on the part of the owner of the rent to resort to the fund, in order to preserve his right of distress? If each of the several remedies may be pursued until satisfaction, and if a judicial sale does not, as is shown by *Sands vs. Smith*, necessarily destroy the right of distress in the same manner as the lien against the land itself for the rent would be divested, this result might seem to follow. At all events the extent to which the cases have gone is, that where the deed provides an express remedy against the land, the owner of the rent must resort to the fund, and the land passes to the purchaser discharged of any liability against it; but if the deed provides no such remedy, or no such remedy by re-entry, the right of distress remains. No case has *held* that the right of distress is gone when the deed gives the remedy, by re-entry, against the land. And if this right survives, since ground rents are rents service, to which distress is inseparably incident, the case would not seem to be altered if the deed did not contain the clause of distress.

As to the "*principle of lien*" on which *Bantleon vs. Smith* was decided, and which Chief Justice Gibson declared he could never understand, we have now a word to say.

The distinguished counsel who argued the cause for the judgment creditors stated, that the "lien of a landlord for his arrears is

founded exclusively upon his right to distrain, and for want of distress to *re-enter*." The Court assumed the lien to exist, but evidently did so upon the grounds on which the argument of counsel had placed it; for in discussing the question of interest upon the arrears, Chief Justice Tilghman *limits* the right of the owner of the rent to the principal of the arrears, *because* his right of re-entry under the deed gave him the right of holding only until the principal was paid, and intimating that if the deed had given the right of re-entry as of the grantor's former estate, he might have been entitled to interest also—thus *measuring* the *extent* of the lien by that of the right of re-entry. Chief Justice Gibson, himself, surmised that this, together with the principle of policy of giving the sheriff's vendee a clear title where practicable, was probably the principle of the lien. This subject is noticed and commented upon in volume II. of Penn. Law Jour., page 182. The writer alludes to the decision in *Bantleon vs. Smith* as to the *priority* of the lien for rent, and says: "But it is remarkable that no principle is referred to by the counsel on either side, or by the Court, as the foundation of the doctrine. It is treated all around as if it were a consequence of the rights of distress and re-entry reserved by the deed; but nothing is said to show how this consequence is to be inferred, nor is the justice of the mere inference gainsayed by the opposite counsel." It is very true that no explanation is given as to how the priority of lien is the result of the right of distress and re-entry. We think, however, *the reason* is obvious. The right of re-entry gives to the owner of the rent the right against the grantee of the land, and those claiming under him, to enter upon and hold the land either until his arrears are paid, or as of the grantor's former estate, as the case may be. This right existing, the owner of the rent has a right to the land itself against all persons from the date of the grantee's deed whereby the rent is reserved, down to the last owner or incumbrancer claiming under him. In view of this right, either because the law abhors forfeitures, or for convenience sake, or by reason of the principle of policy of giving the sheriff's vendee a clear title, where practicable, when the land is sold and converted into money the Courts have held this right to the land to

be transferred to the fund so far as to pay the arrears, sometimes with and sometimes without interest, according to the circumstances of each particular case. *This right once transferred* to the fund, therefore, *necessarily* reverted back to the date of the ground-rent deed, and took priority over all claiming under the grantee subsequently. This seems plain and reasonable. The writer alluded to, however, suggests another principle by which the lien could be sustained, and which we think entitled to consideration. It is that of equitable lien for the purchase money of the land. A ground rent is the purchase money, and, although the principle of equitable lien has been exploded in Pennsylvania, as stated by Chief Justice Gibson in *Sands vs. Smith*, yet, observes this writer, at the time of *Bantleon vs. Smith* it had not been questioned here; and the objections to the principle are founded altogether upon our policy as to notice of liens, which could not apply to the arrearages of rent, as no new principle of notice is introduced.

The next case in point of time was that of *Buck vs. Fisher* (4 Wh. 516), decided in 1839. This was an action of covenant for arrears of the ground-rent. The deed contained the "usual covenants on the part of the grantee." On the trial below, the judge charged the jury that the plaintiff was entitled to interest from the several days on which the ground-rent became payable. Upon exceptions to the charge this point was given up on the argument before the Court above, and the judgment was affirmed without allusion to it.

This case was succeeded by *Dougherty's Estate* (9 W. & S. 189), decided December Term, 1844. There had been a sale of the land under the judgment of a stranger. Arrearages of ground rent and interest were claimed. The deed contained the clause of distress, and if sufficient distress not found, to enter and rent the premises for such a length of time as might be sufficient to discharge the rents, and if neither goods nor buildings be found, and the rent be in arrear over one hundred dollars, then to hold as though the indenture had not been made. The arrears exceeded one hundred dollars. The Court below confirmed the auditor's report, awarding the principal without the interest of the rent, and this judgment, on the authority of *Bantleon vs. Smith*, was affirmed.

Next followed *Pancoast's Appeal*, (8 W. & S. 381,) decided March Term, 1845. The land was sold under the judgment of a stranger. The ground rent deed contained the usual covenants and clauses of distress, re-entry, &c. The Court below decreed the arrears of ground-rent *and interest* out of the fund, and this decree on appeal was *affirmed*. No allusion whatever being made by the Court or counsel, as far as appears from the case, to the claim for interest. The opinion is very brief, re-affirming *Bantleon vs. Smith*, and repeating that *Sands vs. Smith* was not intended to impair its authority, and intimating that the former case "was not thought to be so conclusively founded in legal reasoning, as to be a rule for cases in which the premises were not debtor for the rent," in which latter description *Sands vs. Smith* was supposed to fall. In reference to the main point, the Court say, "Here there was a clause of re-entry, as there was in *Bantleon vs. Smith*; and as the tenant's estate was immediately liable to make satisfaction, what matters it whether it has been sold on a judgment recovered by a stranger, or on a judgment recovered by the landlord on the covenant in his ground rent deed? The landlord had a lien on the estate of the tenant, and he may have recourse to its substitute brought into Court, however the conversion into money may have been effected."

The last case we have to notice is that of *Ter-Hoven vs. Kerns*, (2 Barr, 96,) decided December Term, 1845. This was also a sale by a stranger, and arrears of ground rent, with interest, were claimed. No reference is made in the case to the covenants in the ground rent deed, but it was *held*, and seems to have been stated as a general proposition, on the authority, again, of *Bantleon vs. Smith*, that the owner of the rent was entitled to the *principal*, but *not the interest*, out of the fund.

Such are the authorities upon this subject, and we think the following conclusions are to be drawn from them:—

*First.* Without regard to the special covenants in the ground rent deed, if the proceeds of the sale of the land are not sufficient to pay the arrears of ground rent, the owner of the rent may distrain upon the land in the hands of the Sheriff's vendee, for whatever amount the fund was deficient.

*Second.* That it is at least questionable whether he is bound in any case (except of course, that of his own sale,) to resort to the fund, but may distrain upon the land after the sale, for the arrears due before.<sup>1</sup>

*Third.* If the deed contains no clause of re-entry, and the land is not otherwise expressly subjected to the payment of the rent, and there is a sale under the judgment of a stranger, the owner of the rent can neither resort to the fund, nor the land in the purchaser's hands, but may distrain.

*Fourth.* If there be no clause of re-entry in the deed, and the land is sold under a judgment in covenant for arrears, the plaintiff would not be entitled to any preference over those whose liens were prior to his *judgment*. But,

*Fifth.* If there is a clause of re-entry, the lien of the owner of the rent relates back to the creation of the rent, taking precedence of all subsequent liens, and this whether the sale be under his own judgment, or that of a stranger.

*Sixth.* If there be a clause of re-entry *to hold until all arrearages are paid*, and not as of the grantor's former estate, the owner of the rent is entitled to the principal of the arrearages, but not to the interest, and this whether the sale is under his own judgment for arrears, or upon that of a stranger.

*Seventh.* If there be a clause of re-entry *to hold as of the grantor's former estate*, (or "the usual covenants on the part of the grantee,") and the sale is under a judgment in covenant for arrears, the owner of the rent is entitled to the principal of the arrears with interest from the time each payment became due. And,

*Eighth.* In no case of distress, or resort to the fund, where the sale has been under the judgment of a stranger, can the owner of the rent receive more than the *principal* of the arrears—the precise sum due without interest. For we regard *Dougherty's Estate*, as to interest, to be an oversight, or at any rate, overruled by the subsequent case of *Ter-Hoven vs. Kerns*.

This we submit to be the result of the authorities, unless *Ter-Hoven vs. Kerns* is to be taken as deciding that in *all cases* of a

<sup>1</sup> See 2 Penn. Law Jour. 359.

sale by a stranger, without regard to the covenants in the deed, the *principal* of the arrearages are payable out of the fund; and that interest is not recoverable at all, even in an action for arrears. As to the latter point, the Court say "that the owner of the rent is entitled to have the principal of the rent out of the moneys arising from the sheriff's sale, was settled in the case of *Bantleon vs. Smith*, but not to the interest thereon. This rule has been uniformly observed and adhered to ever since." Now, *Bantleon vs. Smith* was an action of covenant for arrears, and the Court in *Ter-Hoven vs. Kerns*, citing the case for so general a proposition, in a cause where the covenants of the deed are not even alluded to, might seem to imply that it was intended to announce a general rule, applicable to all cases. But the Court, in *Bantleon vs. Smith*, expressly disclaim any intention of laying down any general rule, and explicitly stating that the case was decided upon the covenants of the particular deed in that case, say that the question as to interest is open for discussion when it shall arise under different covenants. We apprehend, therefore, that *Ter-Hoven vs. Kerns* must be confined to the particular circumstances of that case—a fund raised by a sale under the judgment of a stranger, and probably nothing unusual in the covenants of the deed.

Upon the principle of the cases we have been considering, we do not so readily perceive why interest is allowed upon arrears of rent in an action of covenant, and not so when paid from the fund raised by a sale under the judgment of a stranger.

*Bantleon vs. Smith*, as we have just seen, was covenant for arrears, and the party was held not entitled to interest because the right of entry was limited to holding only until arrearages were paid; the Court intimating that if the deed had given the right to enter and hold as of the grantor's former estate, he *might* have been entitled to interest also. *Buck vs. Fisher* was also an action of covenant for arrears; and the deed contained the "usual covenants of the grantee," among them, of course, the right to re-enter and hold as of the grantor's former estate. It is a fair inference, therefore, that interest was held to be recoverable in the latter case by virtue of this right to re-enter. Such being the case, why should

the right of re-entry not have the same effect when the fund produced by a sale under the judgment of a stranger is resorted to? The right of re-entry *per se* has no direct bearing upon, or necessary connection with the action of covenant; but is a distinct and independent remedy for the recovery of the arrears of rent. The connection which does exist is altogether indirect, and brought about by the Courts themselves. And they bring it about, as we have seen, in this wise: upon re-entry for failure to pay the rent, the land is forfeit at law, and the owner must seek the aid of equity, which would relieve upon the terms of paying *interest*, as well as principal. Now, forfeitures are odious in the law; and the remedy by re-entry is an inconvenient one; therefore, the owner of the rent shall be encouraged not to adopt this remedy for the collection of his arrears, but when he resorts to the personal action of covenant, he shall be entitled to recover the arrearages *with interest*. Why does not the same argument apply where a resort is had to the proceeds of land converted into money under the judgment of a stranger? It is by virtue of this right of re-entry, and for the same reasons, that the Courts, in this case, hold the owner of the rent to be entitled to the principal of the arrearages; and why should he not as well be entitled to the interest? If he entered he could hold until paid the principal and interest, but, for the reasons given, he need not re-enter, but may come upon the fund. Why, then, should he not come upon it to reap all the advantages to be derived from re-entry? We perceive no reason for the distinction made.

The length to which this article has extended precludes us from doing more, in closing, than merely adverting to one or two other points connected with our subject.

A previous demand for arrears of ground rent is not necessary to the maintenance of an action of covenant against an assignee; nor is demand necessary before making a distress.<sup>1</sup> Arrears due upon several lots of ground by the same person to the same plaintiff, may be recovered in one action, though the defendant has acquired title to the several lots from different persons, and at different times.<sup>2</sup>

<sup>1</sup> *Royer vs. Ake*, 8 P. R. 461.

<sup>2</sup> *Ibid*, 461.



In the case of re-entry, as is well known, much particularity is required. To entitle the owner of the rent to enter, there must first be a demand of the precise rent due, on the very day on which it becomes due, and on the most notorious place on the land; and this although the land is vacant and unenclosed.<sup>1</sup> Where a power of re-entry is reserved for non-payment of rent, if sufficient distress should not be found on the premises, it is incumbent on the party entitled to the rent, who seeks to enforce this right by ejectment, to show that there was not sufficient property on the premises to pay the rent;<sup>2</sup> if there be a forfeiture for not erecting buildings on the lot, under the stipulations of the deed, a receipt of rent after the time provided for the erection of the buildings, is a waiver of the forfeiture;<sup>3</sup> and if there be no clause of re-entry in the deed, ejectment will not lie to enforce the payment of the rent.<sup>4</sup>

M.

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*In the Circuit Court of the United States.*

**DEVOR ET AL. vs. THE PENROSE FERRY BRIDGE COMPANY.**

1. A Court of the United States has the power to prevent by injunction, the present or future erection of any bridge under the authority of one of the States, that by its construction will interfere with the navigation of a public stream upon which there is a commerce to any considerable extent with other States, though such stream lies wholly within the limits of the State. The question in such case is relative, whether the bridge be or be not a greater obstruction to commerce than benefit to the public.
2. In such case, unless irreparable damage would be done to the defendants thereby, and though an answer be put in denying both the fact and the law, an interlocutory injunction may be granted upon affidavits, at once, until further order; and an issue may be then directed to determine whether the bridge under its present form, &c., is a nuisance to the navigation of the river, and if so, whether any bridge can be constructed at the particular spot which will not be a nuisance.

This was an application to Mr. Justice Grier, for interlocutory injunctions in three cases, involving the same state of facts.

<sup>1</sup> McCormick vs. Connell, 6 S. & R. 151.

<sup>2</sup> Newman vs. Butter, 8 W. 51.

<sup>3</sup> Ibid, 51.

<sup>4</sup> Kennebec vs. Elliott, 9 W. 258.



The following opinion was delivered by him :

GRIER, J.—Three several bills have been filed against the Penrose Ferry Bridge Company, praying for injunctions to restrain them from erecting a bridge over the river Schuylkill. A motion for a special injunction has been made on the notice usual in each case. As they all involve the same questions with immaterial differences, we shall treat them as one case.

The complainants are citizens of other States, and owners, some of wharf property on the Schuylkill, others of coasting vessels, barges and canal boats trading from this port, on that river, to ports in other States.

The bills set forth that the river Schuylkill from its mouth to and beyond the port of Philadelphia is, and for a long time hath been, an ancient, navigable, public river and common highway, free to be used and navigated by all citizens of the United States—that the river has a good tide-water navigation for over six miles above its mouth to the port of Philadelphia, for ships and vessels drawing 18 or 20 feet—that many of said ships, steamboats, barges, &c., navigating said river, are duly enrolled and licensed at the port of Philadelphia, a port of entry within the District of Philadelphia, under and by virtue of the Act of Congress in that behalf made and provided:—That foreign vessels have been accustomed to navigate, and are entitled to navigate the said Schuylkill with cargoes, bound to the port of Philadelphia, and to discharge the same, &c.

That about a mile above the mouth of said river, the channel has been crossed heretofore by means of a ferry skiff or scow, which afforded ample convenience for the travel across the river without obstructing the navigation.

That the Penrose Ferry Bridge Company, a corporation created and established by authority of the State of Pennsylvania, and the other defendants, citizens of Pennsylvania, have collected materials, and are engaged in constructing and erecting a truss toll bridge over and across the channel of said river at the site of the ferry. That it is their intention to erect the bridge at an elevation of only six feet above the level of ordinary high water, and not over one or two feet above the level of the usual freshets in the river.

The complainants charge that the erection of such a bridge as that threatened by defendants, will greatly obstruct the navigation of the river, and will tend greatly to destroy the trade, commerce and business of the citizens of the United States, to their great damage and common nuisance;—that many millions of dollars have been expended by citizens of the United States in the construction of works of public improvement terminating at said port on the Schuylkill, which will be much injured by such obstruction to the navigation of the river.

That the defendants claim a right to erect said bridge under color of certain Acts of the Legislature of Pennsylvania, passed on the 7th of April, 1853, and 15th of April, 1854, and pretend that certain draws placed in said bridge will afford sufficient passage-way for vessels navigating the river; but the complainants charge that the river Schuylkill having a good tide-water navigation to a part of the port of Philadelphia, the citizens of the United States are lawfully entitled to its full and free navigation without hindrance or obstruction by virtue of any State authority; and they aver that the proposed draws are utterly inadequate to meet the requirements of the present commerce and navigation of the river; and that no draw in any bridge to be erected there of suitable height, affording less than one hundred feet clear channel, would afford a sufficient passage to vessels and barges in the manner they are now accustomed to use and navigate the river.

The complainants also severally aver, that they will each suffer special damage to their business or property, if the erection of said bridge be proceeded with in the plan proposed.

A very large number of witnesses have been examined in support and denial of the charges of these bills. The usual practice of this Court on motions for special injunctions has been, to grant them as a matter of course, where no opposition is made by the defendants, on affidavits supporting the charges of the bill. And in patent cases, if the defendant denies, under oath, the equity of the bill, the Court will usually inquire no further, and will not proceed, on a mere preliminary motion and affidavit, to try the whole merits of the case.

But in applications for an injunction, in case of alleged nuisance, the practice has been somewhat different. In such cases, it is not sufficient to deny the law, or the facts relied on in the bill, to have the injunction refused, and the inquiry will be, whether it is not best for all parties that the erection of the supposed nuisance should be arrested till these questions be finally and properly decided. And if no irreparable or very material injury will probably arise to the defendant, the Court will issue the injunction without attempts to adjudicate the merits by anticipation. It is usually better for all parties that an injunction issue even in a doubtful case, till the merits of the controversy are finally decided.

It has been my desire to pursue this course in the present case, and to have silently granted the injunctions, without forming or expressing any opinion on the merits, or the great questions of law and fact involved in the case. But, as the counsel have argued the case very fully on its merits, and as I find that illegitimate inferences have been drawn, and unnecessary fears excited, as to the results and consequences of certain doctrines supposed to be held by the Court on this subject, I have concluded to briefly express an opinion upon the leading questions of law and fact in the case, notwithstanding it may appear to be an anticipation of the final hearing of the merits.

As the defendants in this case claim to act under the authority of the State of Pennsylvania in the erection of this bridge, which it is charged will be a nuisance to the navigation of the river Schuylkill, the right or propriety of the interference of this Court becomes matter of grave and serious consideration.

The river Schuylkill is wholly within the territory of the State. She has exercised jurisdiction over its waters both as a State and a colony. She has authorized the erection of a dam and three bridges below the ebb and flow of the tide. States have an undoubted right to regulate all matters of police, including internal commerce, roads, ferries, canals and bridges. But the power conferred on the general government by the Constitution of the Union, to regulate commerce between the several States and foreign countries, necessarily authorize it to keep open and free all navigable streams connecting

the ocean with ports of delivery or entry, and protect the intercourse between the several States on all our tide-waters. When the exercise of their several powers come into conflict, those of the State must necessarily yield to the superior or controlling power. The jurisdiction of this Court in cases like the present, has been fully considered and decided by the Supreme Court in the case of *The State of Pennsylvania vs. The Wheeling Bridge*, 13 How. 519. This Court is not at liberty, even if so disposed, to disregard the authority of that case, and the people of Pennsylvania, at whose instance the doctrines contained in it were established, are morally estopped from questioning their correctness. It is there decided that, although the Courts of the United States cannot punish by indictment the erection of a nuisance on our public rivers, erected by authority of a State, yet that as Courts of Chancery they may interfere at the instance of an individual or corporation, who are likely to suffer some special injury, and prohibit by injunction the erection of nuisances to the navigation of the great navigable rivers leading to ports of entry within a State.

The commerce on the river Schuylkill below the port of Philadelphia, is as much entitled to this protection as that of the Ohio, Mississippi, Delaware or Hudson; and the complainants in this case have shown the same right to the interference of this Court in their behalf, as was shown by the State of Pennsylvania in that. In fact, every question of law which has been agitated in the argument, either in these cases, or the one which preceded them, has been fully considered and decided by the Supreme Court in that case, and it is unnecessary for this Court to vindicate their decision by further argument.

Let us now proceed to examine the facts in evidence on the present motion, and how far they will justify the interference of this Court by injunction. At common law, every obstruction, however small, to the free navigation of a public river, might, in strictness, be styled a nuisance. But the stringent application of this definition to every bridge over every creek where the tide ebbs and flows, or which a chance sloop might occasionally visit, would be absurd and highly injurious to public interests. Intercourse by

means of turnpikes, canals, railroads and bridges, is a public necessity. A railroad constructed by the authority of a State, is often many thousand times more beneficial to the interests of commerce than the unlimited freedom of navigation over unimportant inlets, creeks or bays, or remote portions of a harbor. It would be unreasonable to insist that the millions who travel on them, should be subjected to great delay or annoyance for the convenience of a few sloops or fishing smacks.

Where bridges are constructed with draws, or openings for the passage of masted vessels, and high enough to permit others to pass under if possible, the occasional delay of such vessels for a short time may be a trifling inconvenience, in comparison with the public benefit of the bridge. In every investigation of this kind the question is relative, not absolute. Whether a certain erection be a nuisance must depend upon the peculiar circumstances of each case—when the trade of the channel is of great amount and importance, and that across it trifling, the same rule cannot apply, as to a case where the conditions are contrary. If a steam ferry can amply accommodate those who cross the stream, and a bridge with a draw would inflict an injury on commerce, and tax the public by increased freight, there is no sufficient reason why a bridge should be erected because it will be more profitable stock than a steamboat or towboat, or better accommodate some small neighborhood or neck of land.

The city of Boston is situated on a peninsula. No public necessity could well exist which would justify a bridge, compelling *all* the commerce of her port to pass through a draw; while it might be very reasonable that vessels passing from one part of the port or harbor to another, should be compelled to submit to some inconvenience for the sake of a bridge erected for one of the great railroads, so important to the prosperity and wealth of the city.

It would be an abuse of the term to call the Schuylkill dam a nuisance, because it is below tide water, and converts a few miles of useless sloop navigation into a canal which annually adds millions to the wealth of the city and State, and whose commerce constitutes the staple of this western portion of the port of Philadel-

phia. Nor is it any appreciable injury to the commerce of the port that vessels with high masts cannot pass the Market street bridge. Ample space for those vessels still remains at the wharves below. The great staple of this western port is coal, and this bridge is built of such a height as not to interfere with the passage of the steam tugs and canal boats engaged in transporting it. The city of Philadelphia now extends across the Schuylkill, and such a bridge is a public necessity. The same may possibly be said of the Gray's Ferry bridge, over which the railroad to Baltimore passes. Vessels with masts and steamboats with high chimneys are, no doubt, put to considerable inconvenience in passing the draw; but the bridge is built so high that the immense trade in coal can pass under it without interruption. Besides, when this bridge was first erected, the commerce of the river was of little importance compared to its present condition, and the mode of transporting the coal has accommodated itself to the state of the navigation and its impediments, as they then existed. If the erection of such a bridge at that place were now proposed for the first time, its propriety might have admitted of some doubt.

With a view to these principles, let us now examine the structure proposed to be erected by the defendant.

1st. The bridge is to be some five or six miles below the port of Philadelphia, although within the present city limits, and about one mile above the mouth of the Schuylkill river.

2d. The defendants propose to erect it at a height of six or eight feet above high water level, and two feet above the usual freshets of the river.

3d. It is to have a pivot draw on a pier in the centre of the river channel, which when open, will leave a passage on each side of the pier of about 60 feet in the clear.

4th. Sailing vessels and single steamboats without tows, may pass with some delay and inconvenience, but sufficient to cause an increase on freight of from three to five cents a ton.

5th. A large portion of the great commerce of this river is coal, conveyed to the port by the Schuylkill canal, which coal boats are

at present towed by small tugs below the Gray's Ferry bridge, under which they can pass without delay or inconvenience. The canal boats containing the coal are then received by steamboats of a larger class, which take them in tow, necessarily ranged four abreast. These would neither pass under the bridge nor through the draws of the proposed bridge, without great danger, difficulty and delay.

6th. The erection of this bridge will necessarily cause an entire change in the transportation of coal on the river below the port. Wharves will have to be constructed below it, and the larger steamboats remain there; thereby greatly increasing the expense of towage by the small boats above.

7th. It will operate as a tax upon coal, of five cents per ton, by increasing its freight to that amount. This item alone amounts to \$20,000 per annum.

8th. The City of Philadelphia, through her Select and Common Councils, has remonstrated firmly against any legislative license for the erection of a bridge at this place, and declares that, by "this dangerous obstruction, trade amounting to more than a million of tons annually, would be seriously impaired, and driven from that portion of the port; and that the large investments of the city in her gas works, and other property on the Schuylkill, and a large proportion of all the wharf front, would be greatly injured by any farther bridge below Gray's Ferry."

9th. It is in evidence also, that the city is now at a great expense in removing the gas works below the bridges; and among the reasons for such a measure, was their expectation of having the bituminous coal imported from Liverpool in large vessels, delivered to them free from the obstruction of bridges; and that the erection of this bridge will cause an additional cost to the city in this matter, of *fifty cents a ton* on all the coal imported for her gas works.

10th. There is no public necessity for the erection of such a bridge over the mouth of the Schuylkill, nor any benefits which will at all counterbalance the evils to commerce which will be caused by it.



11th. The farmers of Tinicum and part of Kingessing, to whom it might be a convenience (especially in winter) to have a bridge at this place, can cross with their market wagons with as much safety and as little delay by steamboat ferry as a bridge. If the quantity of travel is not sufficient to support a steam ferry, it is conclusive evidence that there is no public necessity for an erection of a bridge which will tax commerce to such an extent.

Upon the whole, I think it is abundantly in evidence from the testimony before me, that the proposed bridge if erected, will greatly injure the commerce passing from and to other States, along the river Schuylkill, to the port of Philadelphia; and also that there is no public necessity for a bridge at that place which can justify the sacrifice of other and superior interests to so great an extent. I concur with the City Council—"that any obstruction at or near the outlet of such a great public highway, must seriously interfere with the growth of that trade, and only tend to sacrifice great public interests to partial and individual benefit." (See Journals of Councils, vol. 18, p. 157.)

Such an erection will, therefore, be a public nuisance to the navigation of the Schuylkill river and the commercial intercourse of other States with the port of Philadelphia, and ought to be restrained. Let the injunction issue till further order.

If the defendants desire to pursue this matter any farther, the Court will order an issue to try at next term the following questions:

1st—Whether a bridge, erected as now proposed at the place called Penrose's Ferry, would be a nuisance to the navigation of Schuylkill river, or not?

2d—Whether any bridge can be built at that place which will not materially affect the public interest and commerce of the river?—and if so, of what height, breadth of draw, &c.?

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NOTE.—It may be proper to state that the preceding case, though it involves the same principles, is not that which gave rise to some remarks in a previous number of this Journal; and that the bills upon which it is founded were not in fact known to be in contemplation at the time those remarks were printed. The present bills, indeed, are filed by different parties, and under somewhat different circumstances.



We must also beg leave to disclaim with regard to the article to which we refer, the least intention of applying its observations to the learned and able Court in which these cases arose. For that Court none can have greater respect, or can rest with more confidence on its decisions, than ourselves. Our object was only to deprecate, with earnestness, it is true, but still with great deference, conclusions towards which the Federal Courts in general, appeared to be drifting. The particular case entered very little into the considerations which actuated us; it was only the occasion, not the subject of our remarks; and it may well be that the bridge whose erection has just been restrained, is both hurtful and useless. When the power now claimed is exercised by a judge whose strong good sense and thorough learning are so well known, we might be sure that it would be exerted only in the way most beneficial to the public. But we cannot hope that it will always and in all places, be confided to such competent hands; and that prudence and moderation will invariably accompany its exercise. It involves, indeed, what is substantially an act of legislative discretion; and is enforced by the summary and abrupt process of an immediate injunction.

And setting aside all constitutional considerations, there are few men to whose uncontrolled judgment we would like to trust such a power, especially in the important matters of commerce. This, however, like unfortunately too many other innovations, presented itself with its fairest and most promising side foremost; and some were perhaps inclined to forget, since the doctrine sought to be established would work conveniently in the present, that the precedent might not be looked upon with so much pleasure in the future. Willing, therefore, as we might otherwise be to acquiesce in the wisdom and propriety of this particular decision, it was only the more the duty of those who were convinced of the dangers which be hidden underneath these doctrines, to protest respectfully against their extension.—*Eds. L. Reg.*

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*In the Court of Appeals, South Carolina, 1854.*

W. H. RIVERS, ADMINISTRATOR vs. GREGG, HAYDEN & CO. AND OTHERS.

1. An infant who is furnished with necessaries, and the means in cash of procuring them, by his parent or guardian, or from other sources, is *prima facie* not liable for necessaries furnished by a stranger or tradesman on credit; and a party who seeks to evade the operation of the rule must prove a state of destitution and necessity in the infant. *Burghart vs. Hall*, 4 M. & W. 727, dissented from.
2. But a policy of insurance effected by the creditor under such circumstances, on the life of the infant as security for his debt is not affected, it seems, by its invalidity: and at any rate, the proceeds of the policy cannot be claimed by the infant's administrator.

This was an appeal in equity from the Chancellor of the Charleston District. The facts of the cases appear in the following opinion and decree of the Court below.

DARGAN, CH.—William M. Edings, was a young man of large expectancies. He possessed an absolute and indefeasible estate, the value of which has been estimated by the master, at thirty-five or forty thousand dollars. This includes the accumulated income of the defeasible estate to which he was conditionally entitled under the will of his grand-father, William Edings; which said income, by a decree of this Court, has been adjudged, since the death of William M. Edings, to belong to his estate. In addition to this, he would have been entitled, if he had attained the age of twenty-one years, to an interest in his grand-father's estate, estimated by the master, at seventy-five or eighty thousand dollars. His absolute and expectant estate would, therefore, together have amounted to \$110,000, or \$120,000. His vested estate exclusive of what his estate will receive from the decree of the Court on account of the income of his conditional legacy, was only about \$10,000. He was born on the 22d of November, 1830, and died on the 29th of November, 1850. On his death, under twenty-one years, the whole of his conditional estate passed under the limitations of his grand-father's will to his only surviving brother, without its ever having vested, except as to the income, in William M. Edings.

In March, 1840, his mother, Mrs. Edings, (now Mrs. Hughes,) was appointed by the Court of Equity, the guardian of his person and estate. From 1840 to 1846, his guardian received from the executor, John A. Fripp, the sum of five hundred dollars per annum for his education and support. Her accounts have been regularly returned and vouched. In 1846, by an order of this Court, his allowance was increased to \$1,000. This allowance continued until 1848, when William M. Edings was married. On that event, his allowance, by an order of the Court, was increased to two thousand five hundred dollars, which was ordered to be paid to him and not to his guardian. His wife was also possessed of an estate, which, on her marriage, was settled on her, for her separate use, the income of which, was between six and seven hundred dollars. This income went to the support of the family. The allowance ordered to be paid to William M. Edings, which was intended for the support of himself and family, added to the income from his wife's estate,

made an aggregate of \$3,100 or \$3,200 per annum. He had two children, one of whom died before him. He left a widow, and one child, who survived him three months. The widow still survives.

On the 23d of August, 1851, an order was made referring this case to the master, with leave to report any special matter. The master was also ordered to publish a notice in one of the city papers, requiring all the creditors of the estate to present and prove their demands before the said master on or before the first of September next ensuing. The accounts of the administrator of William M. Edings were also referred to the master, and the said administrator was ordered to pay to the master, any funds belonging to the estate, that had, or might thereafter come into his hands.

The master now submits his report upon the matters referred. He states, that the administrator has rendered his account, and that the same has been legally vouched. He finds a balance due the estate by the administrator of four thousand one hundred and four dollars and  $\frac{37}{100}$ . No exception having been taken to this part of the report, it is ordered, that the said report in this respect be confirmed, and become the decree of this Court.

In the same report, the master submits a statement of the claims of the creditors presented before him, and of the evidence by which they were supported. The master, in his report, has discriminated between what he considers necessities, suitable to the fortune and condition of the intestate, and mere waste and extravagance; rejecting the latter, and allowing the former. The creditors, whose claims have been rejected, have severally filed exceptions to the report; contending that the rejected items of their accounts ought to have been allowed as necessities. I think the master has allowed enough as necessities, in any point of view in which the case may be considered. And for this reason, all the exceptions filed by the creditors are therefore overruled.

But the complainant, (the administrator with the will annexed of William M. Edings,) has also filed exceptions to the report, in which he disputes the right of the creditors, (under the circumstances,) to claim anything as necessities. And this brings up a very important question; a question, which must be of deep concern to

parents and guardians, and to that interesting class of the community, whom, on account of their tender years and need of protection, the Court of Equity has under its own peculiar guardianship and care.

To show the great importance and necessity of this protection, I need not travel out of the facts of this case to present a striking illustration. Under the published order to prove their debts before the master, creditors have presented demands against the intestate's estate, to the enormous amount of \$14,205; all, or a very large part of which was contracted within the last four years of his life, and principally within the last two years. Add to this, about \$9,000 for money actually received by the intestate on account of his allowance, and on account of the income of his wife's estate, all of which came into his hands, and was consumed, and the aggregate is about \$23,000. Thus, we find this infant, whose person and estate was under the protection and guardianship of the Court of Equity, whose estate in possession was only \$10,000, and whose indefeasible estate eventually realized was only \$35,000,—living for the last four years of his life at the extravagant and wasteful rate of nearly six thousand dollars per annum. And this yet, does not present a perfect view of his extravagance. For, as has already been observed, the principle part of the debts was accumulated within the last two years of his life, when his allowance was at its maximum, and when he also enjoyed the income of his wife's estate. He must have expended after his marriage, seven or eight thousand dollars per annum. I was desirous to have gone accurately into this calculation; but the master's report, and the documents and evidence submitted with it, did not afford the data.

When the Chancellor, by his order, granted this infant out of his estate an allowance of \$1,000 *per annum*; and after his marriage, increased it to \$2,500 per annum, did he base his decree, upon what, from the evidence before him, he supposed was *necessary* for the support and maintenance of himself and family, according to his fortune and position? If not, how futile was the preliminary inquiry as to what were his prospects and fortune? Did he grant him the annual allowance of \$2,500, for, and in lieu of necessities;

or did he mean, that he should receive his allowance, and be armed with authority to contract debts, and charge his estate with the payment of double that sum in the way of necessities? If this latter principle is to prevail, then I undertake to say, that the protection which this Court affords to the estates of infants, is a bitter mockery.

The general rule certainly is, that an infant is bound by his contract for necessities. But there are exceptions equally clear, and well settled. *Necessaries*, when the term is applied to an infant, are those things that are conducive, and fairly proper for his comfortable support and education, according to his fortune and rank. So, that what would be considered *necessary* in one case, would not be so regarded in another. The rule is entirely relative in its operation. But what are necessities? Meat, lodging, clothing and education, if the means admit of it, certainly fall within the definition. To which may be added in case of marriage, the support of wife, children and servants. All is relative, and is regulated by circumstances. But if an infant is furnished with these things by his parent or guardian, then the same articles, to the same or a less amount, supplied by another under contract, are not necessary to him. To another, not so supplied, they would be necessary. The same remarks apply with equal propriety and force, where the infant is supplied by parent or guardian, or by this Court, with money to furnish himself with necessities. In some cases, circumstances make it proper, and imperatively demand, that the infant should have the disbursement of his allowance himself. In the case of marriage and house-keeping, the perpetually recurring wants and exigencies of the family, render it impossible that the guardian should always be called on to supervise the disbursement of the fund allowed the infant. Or, if being a youth of fortune, he is sent upon his travels in foreign lands, or even in his own country, the guardian cannot look to the expenditure of the money. It is necessarily entrusted to his own keeping. The brother of the deceased is now abroad on his European travels. Previous to his departure, an application was made to this Court for a proper allowance to defray his traveling expenses. The Court, upon due

consideration, made an order for what was supposed to be the proper allowance; reference being had to the amount of his fortune. Suppose that this young gentleman should expend his allowance, and in addition, should contract debts to the same amount for articles that *prima facie* would be regarded as necessaries? Could these claims be supported, on its being shown, that the infant had an allowance that was amply sufficient to defray all his necessary and proper expenses? I suppose not.

He who deals with an infant, is presumed to know of his infancy. He is bound, at his own peril, to make the inquiry. It makes no difference whether his inquiries result in correct information, or the reverse. It is no excuse, if he honestly supposed from his appearance or other circumstances, that the infant was an adult. The protection of this defenceless class of persons would be very inadequate, if this principle is not further extended. The only safe rule for the security of infants and their estates, is, that he who credits the infant for necessaries, should be bound to know, whether the infant has been supplied with a sufficient amount of those articles by the parent or guardian, or from some other source. The consequence, if any other rule than this prevails, would be, that an infant's estate might be made liable for double the amount of *necessaries*, that were *necessary* for him.

I will not say, that an infant, after being supplied with necessaries, or a proper allowance in cash to procure them, may not, under some circumstances be liable on a contract for necessaries. Suppose, for example, after being furnished with all things necessary for him, he should give them away, or sell them, or waste the proceeds in riot and debauchery. Or suppose, that after having placed in his hands in money, an allowance sufficient for all his wants, he should be robbed of it, or should lose it by accident, or at games of chance. Then, the infant would be reduced to want for the means of bare subsistence. Must he starve with a plenty in his coffers? Would he not be bound by a contract for necessaries under these circumstances? This is stating the strongest imaginable case against the rule. But its wisdom is still manifest. In a case like that supposed, I would say, that the infant would be

bound. But I would further say, that the party who alleged this extraordinary state of facts, must prove them. In other words, when it is shown, that an infant is supplied with necessaries by his parent or guardian, or with funds amply sufficient to procure them, the presumption of law and of reason, must be, that he does not stand in need of credit to obtain what is necessary for him. And after this *prima facie* showing, he who alleges, that notwithstanding this, the infant was in a state of destitution, must take upon himself the burthen of proving his allegation. If he does this in a satisfactory manner, his claim should be allowed. But even then, it should be limited to bare necessaries; and should not be allowed to embrace articles of luxury, which would otherwise be suitable to the infant's fortune and condition in life.

To illustrate these views further, I will advert to what I suppose would be the course which a case like this might take in a court of law. The plaintiff brings his action of assumpsit for goods, wares, &c. The affirmative is with him. He must prove his demand, to be entitled to recover. The defendant, however, has pleaded infancy. This admits the account, and rests the defence upon the affirmation of a fact which the defendant is bound to prove. If to this plea, the plaintiff has replied, that the demand was for necessaries suitable to the defendant's fortune and condition in life, the burthen of proof is again shifted. The plaintiff must prove his replication. This he does, by showing, for example, that the account is for board, clothing, education, &c. On this proof, he would be entitled to recover. But if the defendant has rejoined, that the articles furnished were not necessary to him, because he was furnished with the same articles by his parent or guardian, *here* the proof of all the facts stated in the previous pleadings would become unnecessary. The defendant would be bound to prove his rejoinder. But if the plaintiff has filed a sur-rejoinder, alleging, that although the infant defendant was furnished with support and maintenance, or the means of procuring it by his parent or guardian; *yet*, that by the defendant's improvidence or misfortune, he had wasted or lost his means, so that he was reduced to a state of destitution, and the articles furnished by the plaintiff



were thus become necessary for the infant, *here*, the affirmative is again shifted, and the *onus* is with the plaintiff. In this Court, happily, special pleading never prevailed. But what is valuable and subservient to the ends of justice in the philosophy of that system, is applied *here* in practice in a short hand way; though this Court never suffers itself to be baffled by its subtleties, or entangled in its technicalities.

In a case like that before me, it is not sufficient for the creditor of an infant, for the purpose of obviating the objection that the infant was furnished with necessaries, or the means of procuring them by his parent or guardian, or from other sources, to argue *hypothetically*, that the infant notwithstanding, *might have been* in a state of destitution, which rendered the articles furnished by the plaintiff necessary for him. In a court of equity, as in a court of law, he must state the fact affirmatively, and prove it positively.

The conclusion is, that an infant who is furnished with necessaries, or the means in cash of procuring them, by his parent or guardian, or from any other source, is *prima facie*, not liable for necessaries supplied by a stranger or tradesman on a credit; and that the party who seeks to evade the operation of the rule, and bring his claim under an exception, must prove the destitution and necessities of the infant. And I persuade myself that the most specious objection to the rule has been sufficiently answered.

I was pressed in the argument at the bar, with a recent English decision; which I admit is directly to the point, and opposed to my own conclusion in this case. But for this decision, I should not have deemed it necessary, or incumbent upon me, to elaborate my views upon the subject at such great length. The decision cited though not binding upon me, is entitled to great respect. The case is that of *Burghart vs. Hall*, 4 Meeson and Welsby, Exchequer Rep. 726. In this case, the infant had an allowance £500 of *per annum*, besides his pay as a captain in the guards. Lord Lyndhurst had directed an issue to be tried by a jury. Lord Abinger, in charging the jury, had laid it down, that a tradesman would not be at liberty to furnish necessaries to an infant, when he might have known if he had made the proper inquiries, that the infant



was supplied with an income for his own support. Sir L. Shadwell, had expressed the same opinion in a case against the same party. *Muturs vs. Hall*, 6 Sim., 465. In *Burghart vs. Hall*, the Court of Exchequer granted a new trial on the ground of misdirection of the presiding judge, with the full concurrence of Lord Abinger, who retracted his former opinion, and alleged that he had been convinced by the argument of Mr. Erle, the counsel for the plaintiff. Lord Abinger, who delivered the judgment of the Court, stated the law to be, that an infant is capable, not only of entering into a contract for necessaries for ready money, but also into any reasonable contract for necessaries on a credit, though he has an income of his own, and an allowance that was amply sufficient for his support. I must be permitted to say, that the argument of Mr. Erle, though ingenious, has failed to convince me; and I prefer the first, and in my opinion, the better judgment of his Lordship.

Lord Lyndhurst, deeming the decision in this case authoritative upon him, implicitly followed it without any further argument or precedent, and gave a decree accordingly.

I find no case that goes this length. In *McPherson on Infancy*, 507, it is laid down that, "where the plaintiff has succeeded in showing the supplies, in respect of which the action is brought, were suitable in themselves, to the age and station of the defendant; the latter may show, that he was supplied, no matter from what quarter, with necessaries suitable to his situation; and in such a case, a tradesman cannot recover for any further supply." See *Bainbridge vs. Pickering*, 2 W. Bl., 1835. And it has frequently been held, that a person furnishing necessaries to an infant, under these, and the like circumstances, is bound to make inquiry whether the infant be not otherwise supplied. *Cook vs. Payne*, 3 Car. & P. 114; *Story vs. Perry*, 4 *id.* 526; *Ford vs. Fothergil*, 1 Esp. 21.

In the case last cited, it was held by Lord Kenyon, to be incumbent on a tradesman, before he gives credit to an infant for what may *prima facie* be considered as necessaries, to make inquiry whether he is not provided by his friends. And in *Story vs. Perry*,

it was decided by Lord Tenterden, that a tradesman trusts an infant for necessaries at his own peril, and that he cannot recover, if it turns out that the infant has been otherwise supplied.

In a more recent case, *Burghart vs. Augerstein*, 6 Car. & P. 690, it was ruled, that when an action was brought against an infant for necessaries, it was competent for him to prove that he had been supplied with the same articles (clothes) from other tradesmen besides the plaintiff; and if the proof be, that the defendant had been previously so supplied, the plaintiff could not recover, although the defendant had not paid the prior bills.

To the same effect, are the cases on this subject, decided by the Courts of South Carolina. In *Conolly ads. Hull*, 3 McC. 6, it was held, upon what was considered "a well settled principle, that an infant who lives with and is properly maintained by her parents, cannot bind herself to a stranger for necessaries." And the Court proceeds to observe, "whether the mother in this instance was able, and did maintain her daughters in a manner suitable to their condition, did not appear; but it ought to be *presumed*, until the contrary be proved." In *Edwards vs. Huyhes*, 2 McCord., ch. 21, it was ruled that an infant is not bound for necessaries where he has a "natural or legal guardian to provide for them."

It is a fallacy to suppose, that a distinction can be drawn between the cases where an infant is actually supplied with the necessaries themselves, and that, where he receives an allowance under an order of the Court, which he is to disburse himself in their purchase. If it be urged that the infant may waste or misapply his allowance, and thus be reduced to a state of destitution that would require his necessary wants to be otherwise supplied, it is obvious, that the argument applies with equal force to the case where the infant is supplied with the necessary articles for his use and consumption. These he may sell, give away, or waste, so, that it may become necessary that he should have more, to save him from nakedness and starvation. The party who alleges such a state of destitution as a justification for giving credit to an infant who is otherwise amply provided for, must take upon himself the burthen of proving it. And if he succeeds in this, he will have such relief as is proper under

the circumstances. But until such a state of destitution is made to appear, it must be presumed, that an infant who has an ample allowance in cash, does not need to be supplied with necessaries on credit.

To test this question still further: If the guardian had paid these accounts, would she have been allowed to charge them against her ward's estate? It is a waste of time to ask the question.

No guardian has the right, without the permission of the Court, or without special circumstances of necessity, to transcend the income of his ward's estate in expenditures for his benefit. And the Court in decreeing allowance, always has reference to the same general rule, from which it never departs, unless under special circumstances. And yet, it is contended, that this rule may be violated by tradesmen for their own profit and speculation.

The truth is, that these claimants *did* trust this unhappy youth at their own risk. They knew that they would be paid if he lived, and came to his inheritance. They, *for a consideration*, doubtless, decided to take the hazard. That this is the case, is shown by the fact, that two of them, whose claims are the largest, insured the infant's life for an amount sufficient in one case, to save them from loss, and in the other, to pay half the debt.

I think that the claims of these creditors should not be allowed, for the foregoing reasons. And I further think, that they are entitled to no commiseration. There is but little doubt, that the ill-fated youth was brought to an untimely grave by the improper and unbounded credit which was extended to him by these persons, and others, for their own profit. E. W. Mathews, Esq., bears the following melancholy testimony: He says: "that Wm. Edings, the minor, was his nephew. He and the mother and grand-father of Mr. Edings, used every effort to keep him at school during his minority; but the large credit he obtained, placed him beyond the control of his guardian and friends. His mother even refused him money to return from school, and he had to borrow the same to do so. From his knowledge of the circumstances of the case, he firmly believes that the system of credit extended to his nephew, was the cause of his ruin and early death; and that such is also the opinion of the mother of Mr. Edings. Mr. Edings' mother used all her endeavors to check this system of credit, by refusing to pay a number of bills."

These creditors now come *here* for payment. They extended every facility to the inexperienced and infatuated victim of pleasure. They afforded the stimulus to his brief, giddy, and fatal career. They turned a deaf ear to the remonstrances of his friends. The tears and entreaties of his mother were unavailing. It would be a gross perversion of justice to allow these claims. It is ordered and decreed, that the exception of the plaintiff to the master's report be sustained, and that the whole of the claims of creditors reported upon by the master, be rejected.

There are other matters in this case which I must now decide. The plaintiff's testator Wm. M. Edings, in his lifetime contracted a debt with the defendants, Gregg, Hayden & Company, who were jewellers, to the amount of about two thousand four hundred dollars, for goods and wares in their line of business. For the purpose, they say, "of giving greater certainty to their claim against the said Wm. M. Edings, they, the said Gregg, Hayden & Co., with the assent of W. M. Edings, effected an insurance on his life, with a Boston Insurance Company. The policy was for the term of four years, and the sum of \$2,500. It bore date the 13th Oct. 1848. The premium on the policy, amounting to \$58, was paid by Gregg, Hayden & Co. It was negotiated in the name of Wm. M. Edings, who in pursuance of a previous agreement, assigned the policy to Gregg, Hayden & Co. The premium was charged in their books against Edings, but no part of it has ever been paid by him or his legal representative. Since the death of Edings, Gregg, Hayden & Co. have received from the Insurance Company twenty-five hundred dollars, with the consent of the administrator, and under an agreement with him, that the said sum of \$2,500 shall be held by them, subject to the order of this Court in the premises. They claim only so much of the net proceeds of the said policy as will be sufficient to satisfy their demands against Wm. M. Edings, and offer to pay over the balance to the administrator. If they retain the net proceeds of the policy, they have been overpaid.

The defendants, Edgerton & Richards, also having demands against Wm. M. Edings to the amount of \$4,531 71, effected an insurance upon his life for the same purposes as in the case of Gregg,

Hayden & Co., in the New York Life Insurance Company, for the sum of \$2,000. The policy was dated the 15th March, 1847. It was taken in the name of Edgerton & Richards, who paid out of their own funds the premium and expenses for four years. It was all done with the knowledge and consent of Wm. M. Edings. After his death, they received from the Life Insurance Company of New York the sum of \$1,983 87, according to the terms and conditions of the policy. They paid in the way of premium, &c., during the four years, the sum of \$103. The net proceeds of the policy were \$1,880 87½, a sum not sufficient to pay one half of their claim.

The administrator claims the whole net proceeds of both of these policies, as belonging to the estate of Wm. M. Edings. I have come to a different conclusion. I think that these parties having negotiated these policies at their own expense, and for their own benefit and security, are fairly entitled to have the net proceeds applied in the way they intended, namely, as payments upon their claims against Edings. They were obviously intended as collateral securities. A third party who is *sui juris*, may become bound for the debt of an infant, though the infant would be discharged. And I apprehend it would make no difference whether the third party were a corporation or a natural person. If the creditor of an infant, for a consideration paid by himself, obtains a guaranty of the infant's debt from a third party, I see no reason why such third party should not be bound, nor why the creditor should not have the benefit of his bargain. This I think is the true nature of this transaction. The infant certainly is not entitled to the funds thence arising. This would be to give him the whole of the creditor's goods on the plea of infancy, and as a premium on the plea, the whole proceeds of the policies.

It is ordered and decreed, that the exception of Gregg, Hayden & Co., to the master's report on this point, be sustained, that the claim of the said Gregg, Hayden & Co. against Wm. M. Edings be paid out of the net proceeds of the policy received by them, with interest on their claim till they received payment from the said Life Insurance Company; and that they pay over the balance, if any, to the administrator of Wm. M. Edings, which they have offered to do in their answer.

It is further ordered and decreed, that the exception to the master's report of Edgerton & Richards which relates to the proceeds of the policy of Insurance received by them be sustained, and that the said Edgerton & Richards be allowed to retain the proceeds of said policy, as a payment on their account against the said William M. Edings.

It is further ordered and decreed, that the master's report be conformed to this decree.

It is further ordered and decreed, that all the parties in this cause pay each his own costs; except the administrator with the will annexed of Wm. M. Edings, whose costs shall be charged upon the estate.

The Court of appeals affirmed the decree.

*Cooper & Rivers*, for Complainants.

*B. J. Whaley, W. Whaley and Brown & Porter*, for various defendants.

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*In the Court of Common Pleas, Hamilton County, Ohio, January Term, 1854.*

FRANCIS A. PARISH vs. ELIPHALET FERRIS ET AL.

1. "Heirs" construed to mean children, from the context.
2. Adverbs of time, as *when, then, after, from, &c.*, in a devise of a remainder are to be construed as relating to the time of the enjoyment of the estate, not to that of its vesting in interest.
3. Devise of a life estate, and if the first taker "should die without children," then over, *held* under the circumstances to mean *without having had* children.
4. A testator devised as follows: Secondly, "to my daughter E, the use" of 267 acres of land, "during her natural life, to have full use and control of the same, with the appurtenances to the same belonging, as long as she shall live." Thirdly, He devised to his "daughter E's children, (if she shall have any heirs,) their heirs and assigns forever," the 267 acres of land "after E is done using and occupying it, and at E's death." Fourthly, If his "daughter E should die without children," then he devised the 267 acres to his "brothers and sisters, their heirs and assigns forever, after the death of E as aforesaid." E was unmarried at the testator's death, but married afterwards. She had but one child, which lived only a few hours, and soon died herself, having devised all her estate to her husband.

*Held*, that the limitation to E's children, and that to the testator's brothers and sisters, were alternative contingent remainders in fee, the contingency being the birth of children; and that the first remainder vested in E's child at its birth, descended at its death, upon E; and then passed under her will to her husband.

Petition to quiet title.

*Worthington and Matthews*, for Plaintiff.

*Taft & Storer, Sage, Groyne and William Johnston* for Defendants.

The Opinion of the Court was delivered by

STALLO, J.—This is a petition filed by the plaintiff, Francis A. Parish, in which he seeks to have his title quieted to some two hundred and sixty acres of land in Hamilton county. The defendants, in their answer, deny the plaintiff's title, claiming the legal title to be in themselves. The facts upon which the controversy arises are substantially the following:

On the 7th day of June, 1849, Andrew Ferris, having an only daughter then unmarried, made his will, in which he undertook to devise the property in dispute. This will contained the following clauses:

“Secondly—I give to my daughter Elizabeth A. the use of two hundred acres, more or less, of land, on which I now live, it being the north-east quarter of section No. 22, of the fourth township, of the second fractional range, in the Miami purchase, and one share of the Morrison estate, on the south-east quarter of section 23, of said township; also, six acres, more or less, in section 21 of said township, it being the west half of the north-east quarter of said section, exclusive of the forfeiture, during her natural life, to have full use and control of the same, with the appurtenances to the same belonging, as long as she shall live.

“Thirdly—I give and bequeath to my daughter Elizabeth's children (if she shall have any heirs), their heirs and assigns forever, all of the above described two hundred and sixty-seven acres of land, after Elizabeth is done using and occupying it, and at Elizabeth's death.

“Fourthly—If my daughter Elizabeth A. shall die without children, then, and in that case, I give and bequeath the said 267



acres, above described, to my brothers and sisters, their heirs and assigns forever, after the death of Elizabeth A., as aforesaid."

The will was duly proven in 1849, after the death of Andrew Ferris. In 1850, Elizabeth A. married Francis A. Parish, the present plaintiff, and in 1852 she was delivered of a child, which lived only about one hour. On the 22d of August, 1852, a few days after the death of her child, she made her will, devising to her husband, his heirs and assigns forever, all her property, and soon after died, leaving no children surviving her.

Andrew Ferris left brothers and sisters, the defendants in this case, surviving his daughter.

The controversy in the case arises upon the construction of Andrew Ferris' will; and in consequence of the wide range pursued in the argument on both sides, we deem it necessary at the outset briefly to adduce the cardinal principles of construction applicable to wills, as we understand them to be settled.

I. Wills are not construed strictly, like deeds, but liberally, so that the manifest intention of the testator, though not expressed in technical terms, may be effectuated; for wills, unlike deeds, are usually made by persons when they are unable to avail themselves of the assistance of persons skilled in the law. *Nevertheless,*

1st. The intention of the testator must be collected from the will, and from that alone.

2d. Technical words are presumed to be used in their established legal acceptation, unless the contrary plainly appears; and other words are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected from the context.

3d. The general rules for discovering the intentions of the testator, as established by adjudged cases, as well as the adjudicated meaning of certain words or expressions, are to be adhered to; and

4th. The construction must be such, if possible, that the testator's intent is consistent with the rules of law.

II. The manifest general intent controls particular expressions, which may seem to be at variance with it. *But,*

1st. A mere reason presumed or expressly assigned, or an induc-



tive inference from other parts of the will, or an inaccurate summing up or reference to the contents of the will by the testator himself, cannot prevail over an express and positive devise.

2d. Mere inconvenience or absurdity of a devise is no ground for varying the construction, when the terms are without ambiguity, although conflicting expressions are to be so construed as to effectuate a rational and consistent, rather than an irrational and inconsistent purpose; and the construction is not to be varied, because the testator did not foresee all the consequences.

3d. Favor or disfavor to the object, appearing from the will itself or *aliunde*, cannot affect the construction.

III. Next to those of the testator, the law favors its own intentions; and, therefore, wills are never so construed as to disinherit the heir at law, unless this be required by the express words of the will, or their necessary implication.

We have recited these rules, rather pedantically, perhaps, because the simple statement of them relieves us from the necessity of examining in detail a variety of somewhat strained positions taken in the construction of this will, into which counsel appear to have been betrayed by insisting upon rules which are true only when taken with their appropriate limitations.

Keeping the above principles of interpretation and construction in view, then, I shall now proceed to the task of ascertaining, if possible, the *meaning* of Andrew Ferris' will. So far as this affects the case in hand, it is to be gathered from the 2d, 3d and 4th clauses of the will, as above quoted.

The language of the second clause does not require any particular comment for the purposes of its own construction; it is obviously the devise of a life estate to Elizabeth A. Parish.

The language of the first part of the third clause is: "I give and bequeath to my daughter Elizabeth's children (if she shall have any heirs), their heirs and assigns forever, all the above described 267 acres of land." But for the distinction between the words "children" and "heirs" in their legal and grammatical import, this would be at once conceded to mean the limitation of a remainder, after Elizabeth's life estate, to her children, contingent upon their birth.

Now, does the use of the word "heir," instead of "children," in the parenthetical reference after the latter word vary the construction? We think not. The word "heir" is evidently not defined by its strict grammatical or legal acceptation; for, if it were, it would embrace collateral heirs, and the sense thus resulting would not only be manifestly repugnant to the other provisions of the will, but the word would be an utter anomaly in the place where it occurs, having no possible connection with the word children, to which it is parenthetically appended. And after we have once been constrained to discard the strict legal import of the word "heirs," it can only be defined by its obvious reference to the immediately preceding word "children," for which it then becomes a mere substitute, so that the accent falls on the word "have." The devise then is to Elizabeth's children, if she should *have* any, which undoubtedly creates a remainder over to the children, contingent upon their birth. The doctrine that the word "heirs" may be construed to mean children, if the manifest intention of the testator requires it, rests upon the authority of numerous cases; among them a case in our own State, that of *King vs. Beck*, 15 Ohio, 559.

But, in the second half of this clause, the testator adds the words: "after Elizabeth is done using or occupying it, and at Elizabeth's death." It is contended that the use of these words is evidence of an intention to point out the time of Elizabeth's death as the period when the remainder over to the children was to vest, so that not the birth of the children, but their surviving their mother, was the contingency upon which the vesting of the remainder depended. This argument is valid, if the testator meant to postpone the vesting *in interest* of the estate, as devised to Elizabeth's children, to the time of her death; but it falls to the ground, if he merely intended to designate the time when the *possession* was to be taken. Abstracting from the fourth clause of the will, we think it clear that the latter view is correct, and that the words of the third section relate merely to the time of the enjoyment of the estate, and not to the period when it was to vest in interest. In this connection, it is important to revert to the language of the second clause, under which Elizabeth is "to have full use and control of the property as

long as she shall live ;” just as in the third clause the same property is given to Elizabeth’s children, “after Elizabeth is done using and occupying it, and at Elizabeth’s death.” The language in both instances fixes the limit between the “use and occupancy ;” in other words, the possession by the mother, and the possession by the children. What was to succeed the “use and occupancy” by the mother ? Naturally not the *interest* of the children, but the “use and occupancy” by them.

The view we take of the meaning of this part of the third section of the will is, then, that the words “after Elizabeth is done using and occupying it, and at Elizabeth’s death” were meant to express simply the *fact* that a remainder was to vest in Elizabeth’s children, if she have any, and not the *time when* that remainder was to vest. This view becomes very striking, when we recollect that the will has a separate clause for each single devise. Each clause disposes of the testator’s property to a certain extent ; and it is very difficult to escape the conviction, that the effect of every succeeding clause, in the testator’s mind, was to extend over so much ground only as was not covered by the preceding clause or clauses, so that having once ascertained the scope of the devise in the preceding clauses, the extent and validity of the subsequent devises is preliminarily determined. Thus, in the second clause, the testator gives a life estate to Elizabeth ; there was then a remainder left. This remainder is to go to Elizabeth’s children ; and in the first half of the third clause, “I give and bequeath to my daughter Elizabeth’s children, (if she shall have any heirs,) their heirs and assigns forever, &c.,” the testator expresses his intention that an estate shall vest in these children, if any there be ; and in the latter half, “after Elizabeth is done using and occupying it, and at her death,” he defines this estate as the remainder after the life estate of Elizabeth. In the first half of the clause he designates the *persons* who are to be the objects of his bounty ; in the latter half he describes the *thing*, the nature of the bounty he means to confer.

The rule of construction which is here applied to the words relating to the death of the first taker, is established by a series

of authorities. Among them we may refer to a very recent case, that of *Johnson vs. Valentine*, 4 Sandford Rep. 36, which is selected because it expressly decides that "adverbs of time, as *when, then, after, from, &c.*, in a devise of a remainder, are construed to relate merely to the time of the *enjoyment* of the estate, and not to the time of the *vesting in interest*;" and because it thus disposes also of the argument derived from the fourth clause of the will, where the language, "after the death of Elizabeth" is employed, from which, in connection with the words already commented upon, counsel infer that the state of things at Elizabeth's death was the time contemplated by the testator for the vesting of the remainder. Other cases to the same effect, illustrative of the principle (from which this rule follows,) that the law favors the vesting of estates, will be hereafter noticed in another connection.

After thus giving to his daughter Elizabeth a life estate, in the second clause, and a remainder over to her children, if she had any, in the third, what further had the testator to dispose of? Obviously nothing; unless, in the language of the third clause, Elizabeth "shall have no heirs;" i. e., shall have no children. In the progress of the exhaustion of the estate, through all its parts and contingencies, the testator then arrived at the fourth clause, which reads: "If my daughter Elizabeth A. shall *die without children*, then," &c. The contingency referred to in third clause, we have seen, was, that Elizabeth might *have* no children; in the fourth clause, the *same* contingency, instead of being spoken of in the same words, is denoted by the expression "dying without children." The phrase "to have no children," would seem to be plain enough; it does not mean to have no children at any particular time, but it means, to have no children at all, at any time,—to have no children born. The contingency, as first contemplated by the testator, and referred to in the third clause of the will, was, therefore, that his daughter Elizabeth might never have any children. Now, does the use of the *different* words "dying without children," evidently descriptive of the same contingency, force us to conclude that the testator had changed his mind when he

wrote or dictated the fourth clause? We think not. It may be difficult to determine, whether the more natural meaning of these words be "dying without *having had* children," or "dying without children living at the parent's death." But the question we are now considering is not, whether the former be the more natural interpretation, but, whether it be generally an *admissible* interpretation; in other words, we are now inquiring, whether or not there be any necessary repugnance between the words of the fourth and those of the third clause, relating to the same subject-matter. And we cannot see that the words "dying without children" are violently distorted from their true meaning by being interpreted to mean "dying without having had children."

This leads us to a consideration of the authorities cited on either side, chiefly in reference to the construction of the words "dying without children." It is urged on the one hand that these words are equivalent to "dying without issue," which latter words have been adjudged in an almost interminable series of cases to mean not *a dying without issue living at the time of the death of the first taker, but a general or indefinite failure of issue*. On the other hand, it is contended that the words "dying without children" are by the authorities distinguished from the words "dying without issue," and restricted to the sense of "dying without children" living at the death of the first taker.

We have examined these cases as carefully as time would permit, and we think it cannot be denied that looking to the mere letter the authorities appear to be conflicting. But we also think that, in a great measure at least, the discrepancy vanishes when it is recollected that all these cases deal with the construction of wills and not with that of deeds or other deliberately framed instruments; that they seek to define not the force of a word, but the general sense of a context; and that from the very nature of the investigation the tendency there is to *fuse* words and their meaning, not to *petrify* them. When we come to examine what were the questions raised in the different cases, and upon what grounds the decisions rest, they can, with few exceptions, be harmonized without much difficulty.

Without attempting to review all the cases in detail, then, we will simply announce the conclusion at which we have arrived: that the distinction between the words "dying without issue or heirs" and "dying without children," wherever it is made, is made solely with the view of escaping the rigor of the rule that executory devises limited to take effect after a *dying without heirs*, or *without issue*, or *without leaving issue*, are void, because the contingency is too remote—the words "dying without issue," &c., having invariably been held to import an indefinite failure of issue.

In order to uphold the intentions of the testator against the effect of this construction, courts have availed themselves of the slightest circumstance, the least variation in the phraseology, in order to construe the failure of issue contemplated by the testator as definite—as occurring at a precise time fixed by the testator himself, such as the death of the first taker—and not as indefinite, as happening sooner or later, whenever the whole line of descendants of the first taker should have become extinct. Thus, courts have adopted one rule of construction in regard to bequests of personal property, and applied another to devises of real estate, even going so far as to interpret the same words differently in the same will, on the ground that owing to the perishable nature of personalty, the testator could not reasonably be presumed to have contemplated the failure of issue at a period indefinitely remote, when the property itself would be no longer in existence. So also the use of the word "children," instead of "issue," coupled with other expressions in the will clearly indicative of the testator's intent, has been construed to limit the failure of issue to the time of the death of the first taker; because "children," in the primary sense of the word, are descendants of the first degree, and not, like "issue," descendants generally. But in order to appreciate the value and scope of this distinction, it is important to bear in mind two things. *First*, that the question in those cases where the distinction was made was, whether or not the executory devise was valid at all, *in any case*, no matter what the facts otherwise might be; *i. e.*, whether or not upon its face, and upon a mere interpretation of the words "dying without children," &c., the executory devise should be pro-

nounced void for remoteness, in spite of the obvious intent of the testator, even if there never had been any children; and therefore the question was, not so much *when* the estate limited over was to take effect, but *whether or not* the estate was, in any event, to take effect at all; so that the question of time was merely incidental: and *secondly*, (what is in substance the same,) that the question stood between an *indefinite* time when the devise was meant to take effect, and a *definite* time, and *not* between *one* definite time (the death of the first taker,) and *another* equally definite time (the birth of a child of the first taker). Indeed, the very reason why the definite is preferred to the indefinite period is, that the former is less remote; and it would be a strange perversion of the whole reasoning, which upholds the distinction claimed for the defendants, if it were so applied in this case as to postpone the vesting of the estate instead of hastening it.

The true doctrine illustrated by all these cases is, that the law favors the vesting of estates; a doctrine which is supported by all the authorities. We have no doubt, therefore, that the contingent remainder limited to Elizabeth's children vested at the moment of the birth of the first child, subject to open and let in after-born children, if any there be. It is almost a matter of supererogation, to refer to the cases directly bearing upon this point; we will only notice a few. One is the case of *Macomb vs. Miller*, 9 Paige, 265, where there was a devise to A for life, with remainder to her child or children, if she should leave any; and if she should die and leave no lawful issue, with remainder over. A survived the testator, and had one child, and she survived her child, and was left a widow. It was held that the devise to her children or issue was a contingent remainder in fee, and which, on the birth of a child, became a vested remainder in fee, subject to open and let in after-born children. Another very recent case is that of *Wight and Wife vs. Baur*, 7 Cushing, 105, where the devise was to the daughter for life, and then to her children, their heirs and assigns; and if she should leave no child, then to the testator's grand-children. Judge Shaw, in deciding this case, says: "In the actual case, as there were children in being, it is a vested remainder. It may be proper to



remark, in passing, that if there were no child in being at the death of the testator, it would have been a contingent remainder until a child should be born, but would immediately vest on such birth." See also 7 East, 521; 12 Engl. Com. Law Reps. 392; 4 Comstock, 257; 2 Barbour Ch. R. 314; 26 Wendell, 229; 17 Serg. & Rawle, 441; 12 Gill. & Johns. 83; 3 Atk. 774, and other cases.

In apparent hostility to all this, however, stands a case in 5 Day, 517, *Morgan vs. Morgan*. The devise there was to the testator's sons, B, C, D and E, their heirs and assigns forever, with a clause, that in case either of his sons should die without children, his brothers should have his part in equal proportion., B was married and had issue, a son, who died during the life of B. B died and left no children living at the time of his death. It was held, that the limitation over was good by way of executory devises and that the words "die without children" meant *a dying without children living at the death of the first devisee*.

The anomaly of this case is explained, when we look not only to the decision of the court, but also to the argument; from which it appears, that in this as in the other cases, the question raised and decided was, whether or not the executory devise was void for remoteness. That it was not so void, is really the only principle supported by the reasoning of the case; and it does not in the least shake our faith in the correctness of the construction we are compelled to give to Andrew Ferris' will.

Against this construction it is urged, in addition to the arguments already noticed, that the manifest *general* intent of Andrew Ferris was to keep his property in his own family,—to leave it to his lineal descendants, in preference to other relatives, but in the absence of direct issue to give it to his collateral kindred; and that, if now alive, he would repudiate that construction of his will, the effect of which is to give the property to a stranger, whom he, perhaps, never saw. This may be so; but it is fully answered by the supposition of another case put by counsel for the plaintiff. Elizabeth might have had a child, which, living to the age of maturity, might itself have had issue, and then died before Elizabeth, leaving,



not a child, but a grand-child surviving Elizabeth. If the testator's intention was, that his property should go to his lineal descendants in preference to his collateral heirs, this intention would then surely have been defeated by the construction now claimed on behalf of the defendants. The truth is, the testator's intention must be ascertained by the fair construction of his will, not by conjecture; after all, it is the *intent* of his written testament which we are to seek, not a possible *intention* of the testator in case he had foreseen every imaginable contingency. We cannot attribute to him a *shifting* intention varying with the play of unforeseen events. His last will and testament is the fixed, irrevocable word of a dying man; we can, in pious regard for his last wishes, concede to it all the pliability necessary to accommodate one abiding purpose, but we cannot quicken it with the consistent activity of a living mind, and its fresh, present, continuing volition. Andrew Ferris, undoubtedly, had a theory of the future, by the light of which his will must be read, and, as is usual, that theory was incomplete, because it failed to embrace elements which time added to the calculation. It is for us, however, not to complete that theory by interpolating the data of subsequent experience, but, if, possible, to reproduce the testator's faint vision, in order thus to see how the objects and events among which he contemplated the course of his property to lie will group themselves. The true construction of Andrew Ferris' will must be the same now, as it would have been given in 1849, before or immediately after the testator's death, when the marriage of Elizabeth with Francis A. Parish was only one among many other possibilities which have never been realized.

Our opinion is, that the devises to Elizabeth's children and to Andrew Ferris' brothers and sisters are alternative contingent remainders, of which the former vested at the birth of Elizabeth's child, whereby the latter was defeated. There will accordingly be judgment for the plaintiff, quieting his title.

*Pennsylvania Sixth Judicial District.*

COMMONWEALTH vs. SAMANTHIA HUTCHINSON.

1. No indictment can now be sustained in Pennsylvania, against a female, as a common scold.
2. Whether an indictment concluding against the peace "of the *faithful subjects* of this Commonwealth" is good, *dubitatur*.

This was an indictment against the defendant Samanthia, as a common scold, upon which she was found guilty of the charge. A motion for a new trial, and in arrest of judgment was made upon reasons which will appear in the opinion of the Court.

GALBRAITH, P. J.—The motion for a new trial is overruled, as a new trial would be unnecessary, if even sufficient grounds for it existed, for the reasons given on the motion in arrest of judgment.

The reasons on which the latter motion is founded, are mainly two, viz :

1st. That the form of the indictment is defective and erroneous, in charging the defendant as "a common scold and disturber of the peace of the neighborhood, and of all faithful *subjects* of this Commonwealth," &c.

2d. That the offence of common scolding is not indictable as a crime in Pennsylvania.

There is probably much force in the first reason mentioned: that we know no such term as *subject* in this country, by which to designate the people; or as constituting a part of the living, intelligent and rational members of the body politic. But as this objection goes only to the formal part of the indictment, and a decision upon it but little, if any, practical importance, it is better to meet the whole charge upon its merits, so that if the decision is deemed erroneous, it may be taken before the Supreme Court and set right, or expressly provided for by legislative enactment; and that the time of the Quarter Sessions may not be occupied, and the administration of justice burdened and encumbered with proceedings so unprofitable, and may I not say, as mischievous, as those under consideration have most generally proved. Such prosecutions originated in a different age from that in which it has been our lot to be cast.

They belong to that age of barbarism when women were burnt as witches, and men had their ears nailed to a pillory—when learning and ingenuity were put to the rack to invent contrivances for punishment and torture, instead of reformation and moral and mental culture. Where is the law which requires, or authorizes this Court to inflict any punishment upon the defendant here? Is there any act of the legislature defining the offence, or prescribing the sentence that shall be pronounced against it? Any decision of the Supreme Court which declares either? The case of Nancy James, reported in 12 S. & R. 220, has been referred to, but that case, so far from requiring a sentence in this case, is authority against it. The whole reasoning of the Court is against it, notwithstanding Judge Duncan, who delivers the opinion, says that he accedes to the opinion of his brethren in considering the offence as indictable. That was not the point in the case, and no authority is to be drawn from it, when every argument he uses against the particular sentence in that case, would apply nearly if not quite as forcibly to the question of its being indictable at all.

Penal laws form an important element in the organization of all civilized and well-ordered communities; and vitally concern the peace, happiness and security of the members. An essential requisite in every penal law is, that it should be free from uncertainty or obscurity. Every citizen has a right to know what acts are to be regarded as criminal, so clearly defined, and the punishment so explicitly described that there may be no danger of mistake. Now, who can tell what acts shall constitute a *common scold*, (*communis rixatrix*, or *ruxatrix*?) It is laid down in the books that the evidence by which the fact is to be established, shall not be of particular acts, but of common fame. The defendant is thus left to the mercy of the witnesses, the opinion they may entertain and express through the poisoned medium of prejudice, personal malice, as is believed to be generally the case.

And who can prepare to meet such evidence? The jaundiced opinion of a witness, operating upon the opinion of a jury, is made the basis upon which a verdict is predicated, and upon which the liberty, character and happiness of the defendant for life depend.

Again: who can tell what punishment shall follow a verdict of conviction? The Supreme Court have decided that the only defined punishment we find in the books—the ducking or cucking stool—is obsolete and abrogated. What then? Fine and imprisonment? Where? how long to be confined? how maintained? what amount of fine? Is any citizen, male or female, to be subjected to so vague, undefined and unprescribed infliction, and suffer the privation of property, liberty and character, at the arbitrary will of any man? I entertain an instinctive abhorrence of such a position, and can never give my consent to its sanction.

Again: can a sound reason be assigned why that should be criminal—punished by fine to any unlimited amount, and imprisonment in a dungeon without limit as to duration—when acted by a woman, and innocent and lawful when acted by a man? The origin of such unjust distinction is too flagrantly congenial with that state of barbarism in which woman was regarded as the slave and not the companion of man—when the belief practically obtained that she was destitute of a soul. Christian civilization has assigned to her a different position—a just claim to equality of right and consideration; and therefore, a law which draws a distinction so degrading to the woman can find no countenance in our institutions, based upon the great principle of universal equality.

Another error of barbarism entered into the invention of a punishment for this as well as other petty offences in the manner mentioned in the old books. The purpose and object of punishment was supposed to be the meting out of *justice* by the infliction of a certain amount of pain or degradation commensurate with the supposed evil done—a compulsory and arbitrary expiation or payment for the act already committed, by way of *vindicating* the law. The notion of cruelty, torment or degradation as the design and purpose of punishment, has happily in a great measure vanished and passed away, and the true and more enlightened purpose of punishment discovered in the reformation, improvement and amelioration of the offender. With this in view, as the only legitimate purpose of penal infliction, the result of a more civilized and cultivated state, the trial, conviction, sentence, and all the degrading parade accompanying

a grave charge against a persecuted or unfortunate woman as a common scold, would be strikingly ridiculous and absurd—at war with the more benign, true and enlightened sentiments of the public on the subject of punishment, and tending rather to defeat than to advance the objects of penal law, and bring the administration of justice into reproach.

Without multiplying further, or adding reasons that might be given, the judgment in this case is arrested, and the defendant discharged.

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*Common Pleas, Philadelphia County, Pa., 1854.*

CHILLAS vs. BRETT.

Under the Act of 1845, with regard to appeals in equity, an appeal perfected, after the levy of a *fi. fa.*, or a decree, but before sale, is a supersedeas.

In Equity. Rule to show cause why a writ of *vend. exp.* should not be awarded.

The opinion of the Court was delivered by

THOMPSON, P. J.—The decree in this case was for the payment of money by the receiver. The plaintiff obtained a writ of *fi. fa.* to enforce the decree, as prescribed by the rules of Court. The sheriff levied upon the goods of the receiver, and three days after the levy, the defendant took his appeal. It is contended by the plaintiff, that the appeal taken after the levy upon the *fi. fa.*, was no supersedeas, and he moves that a writ of *vend. exponas* be awarded.

The Act of 17th of March, 1845, which regulates appeals in suits in equity, prescribes the same terms and regulations, as are provided in case of appeals from the decree of our Orphans' Court, viz: The party appealing, must give security by recognizance, make oath that the appeal is not intended for delay, and perfect his appeal within three years after the final decree. These terms being complied with, the appeal shall stay all proceedings in the Orphans' Court. In addition to a compliance with the terms and regula-

tions, required in an appeal from the Orphans' Court, the Act of 1845, further requires, that in order to secure a stay or supersedeas of execution in equity, where the decree is for the payment of money, the appellant is required to give a bond to the adverse party, in at least double the amount of the sum decreed to be paid, with two sufficient sureties, to be approved by the Court; and it declares that such appeal being so perfected, shall *stay all further proceedings* in said Court, *upon the order or decree appealed from*, and upon the subject matter embraced in such order or decree. The evident intention of the act is, that if such appeal be perfected within the period allowed for the appeal, and before the decree is performed, the decree or order shall not be enforced. The process by which decrees are usually enforced in equity, whether attachment or sequestration, cannot be proceeded with after the appeal; the entire proceeding is arrested. The adoption by the Court of the writ of *fi. fa.* as final process to execute decrees for the payment of money cannot, of course, alter the effect which the law designed to give the perfected appeal, and where such writ has not been fully executed, before the appeal is perfected, the Court can do no act by which the decree may be enforced. In this case, the levy has been made upon the *fi. fa.*, and so returned by the Sheriff. At common law, such an execution is considered executed, and a writ of error is too late to arrest the sale of the goods levied on, but undoubtedly, such sale in this case would be a proceeding upon the decree appealed from. By authorizing the *vend. exp.*, the Court would be enforcing that decree, which by the plain terms of the Act of Assembly, they have not the power to do while the appeal is pending. The rule therefore, must be discharged.

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*In the New-York Supreme Court.*

MATHEWS vs. MATHEWS.

An exception in a grant of lands in these words, "excepting and reserving out of the said piece of land so much as is necessary for the use of a grist mill on the east side of the road at the west end of the said mill-dam," is a good exception; but until the grantor or his assigns exercise the right reserved, and builds the mill, it is not operative, and ejectment cannot be sustained.

The plaintiff brought ejectment to recover the land described in the exception contained in the deed, hereinafter mentioned. The defendant pleaded title out of plaintiff and in himself.

On the trial it appeared in evidence, "that on the 2d day of February, 1809, John and Stephen Delematter (the then owners of the premises under a conveyance from William Cook, who derived his title directly from the soldier,) and their wives, by deed recorded 27th February, 1811, in consideration of \$1000, conveyed to Stephen Wilcox fifty acres in the south-east corner of lot sixteen Manlius, and made a reservation in said deed as follows: "Excepting and reserving out of said piece of land so much as is necessary for the use of a grist-mill on the east side of the road at the west end of the saw-mill-dam," and that the plaintiff has, by a number of deeds, received a regular conveyance of the privilege and right of all the same, specified in said exception and reservation.

That the plaintiff in 1821 or 1822, erected a grist-mill adjoining the premises (but not on lot 16 Manlius, the reserved premises,) and has occupied the same up to the time of the commencement of this suit, and the dam which was built in 1803 or 1804, that raises the water for the use of the grist-mill, is partly on the land embraced in said exception, and the water so raised flows some portion thereof, and the plaintiff has entered on and upon said land embraced in said exception from time to time for the last twenty-five years, for the purpose of repairing his dam, and the greater portion of the premises so excepted are necessary for the use of the grist-mill of the plaintiff adjoining the premises contained in said exceptions for the purpose of having the dam as a part thereof, thereon, and to be flowed with water and to procure earth and material to repair the dam as well as to enter upon the same for that purpose. The centre of Chittenango Creek is the east line of lot sixteen Manlius.

The plaintiff had judgment, and on a case agreed a motion was made for a new trial.

*H. Burdeck*, for Plaintiff.

*Le Roy Morgan*, for Defendant.

The opinion of the Court was delivered by

PRATT, J.—The principal question involved in this case has been

settled by an adjudication in this Court in the case of *Dygert vs. Mathews*, 11 Wend. 35. That was an action of trespass brought in 1830, in the Onondaga Common Pleas by Dygert, who was then in possession of the premises now in dispute against Mathews the present plaintiff, for taking gravel therefrom to repair the mill-dam. Mathews attempted to justify under the same title upon which he claims to recover in the present action. Upon the trial in that case it was ruled that the premises in question did not pass by the deed from Delematter to Wilcox, and that it was not necessary for Mathews in order to avail himself of the exception in that deed, to build his grist-mill upon the premises excepted. The defendant obtained a verdict upon which judgment was entered, and the cause was carried to the Supreme Court upon writ of error, where the judgment of the Common Pleas was reversed. The Supreme Court held that the exception in the deed to Wilcox was not intended to except from the operation of the grant the absolute fee of the land, but, that it was designed to reserve simply a mill site or privilege; that until the right reserved should be exercised by the grantor or his assigns by building the mill upon the same premises, the reservation would be inoperative and the whole premises would vest in the grantee and his assigns. The decision in that case covers the whole ground and is well sustained by the cases of *Thompson vs. Gregory*, 4 J. R. 81, and *Provost vs. Calder*, 2 Wend. 517, cited by the learned judge who gave the opinion of the Court. It is true the language of his opinion would seem to lay down a proposition which cannot be sustained in the broad terms in which it is enunciated. He says "those cases" (alluding to the cases above cited) "recognize the doctrine that strictly an exception of a part of the thing granted is void, but an incident to the grant may be reserved." I find no such doctrine advanced in those cases, but directly the reverse is the rule laid down in the books. An exception to be good "must be a part of the thing granted and not of some other thing," Shep. Touchstone, 78; Co. upon Litt. 47; and 1 Atkinson on Con. 322; 2 Prest. on Con. 462. It is true, the exception must not be repugnant to the grant, and therefore it must be of a particular thing out of a general, and not of a particular thing out of a



particular thing. For instance, if one grant White-acre and Black-acre, excepting White-acre, the exception would be void, for White-acre being mentioned by name in the grant, the exception of the same thing granted would be repugnant and therefore void. So if one grant twenty acres of land excepting one acre, the exception is void, but if the grant is, of all that close containing twenty acres, excepting one acre, the exception would be good, for in this instance, it is the close, and not the particular twenty acres, which is granted. Shep. Touchstone, 78. So far therefore as the exception in this case was of a part of the thing granted, it might be good, provided the design of the parties had been to except from the operation of the grant the premises in question, and the premises had been described with sufficient certainty.

And this leads us to the consideration of another rule in regard to exceptions in a grant which bears more directly upon the conveyance in question in this case. The description of the thing excepted must be as certain as if it were granted. Prest. on Con. 462; 1 Atkinson on Con. 382. "If one grant a house excepting one chamber, or grant a manor, excepting one acre, but doth not set forth which chamber, or which acre, it shall be these exceptions are void for uncertainty." Shep. Touchstone, 79. Under this rule it is manifest that as an attempt to reserve out of the operation of the grant, the fee of the land, the exception in the deed to Wilcox would be void for uncertainty. It would be entirely uncertain until the mill should be built, and the land appropriated, how much land would be necessary or where located.

It was for the same reason that the Court in the case of *Thompson vs. Gregory*, held the exception in that case void as an exception of the land itself. They held it void for uncertainty and not because the exception was of part of the thing granted as the learned judge seemed to assume in the case of *Dygert vs. Mathews*.

But as the reservation of a mill privilege, which is a mere incident to the grant, the exception is good. As it would be inoperative until the right should be exercised, no such certainty is requisite. The title of the property would pass to the grantee, subject to the reserved right, and he would be invested with the absolute

control of the premises except as against the grantor or his assigns in the actual exercise of the right reserved.

But if the exception should be held good as a reservation of the land itself, it was an exception only of so much as was necessary for the purposes of the mill. It would therefore necessarily raise a question of fact requiring proof. No proof upon this question was adduced, and it is difficult to perceive how the referee could assume that the premises described in the plaintiff's complaint were the precise quantity of land necessary for the purpose of a mill. The language of the exception is as follows, "Reserving out of said piece of land so much as is necessary for the use of a grist-mill, on the east side of the road at the west end of the saw mill-dam."

The land necessary is the measure of quantity, and this could only be ascertained by proof.

Again, if it was important that the defendant should show title in himself, the deed from Brooks to him was clearly competent for that purpose under the pleadings. It was perhaps sufficient for the defendant to show title out of the plaintiff, but the particular objection taken to its admission was clearly untenable.

The judgment must therefore be reversed, and a new trial granted.

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## ABSTRACTS OF RECENT ENGLISH DECISIONS.

*Arbitration—Joint Execution.*—Where an award is to be made by more than one arbitrator, it must be the joint act of all, executed in the presence of each other; therefore an award in such case which purports to be signed and published by the arbitrators at different places is invalid. *Wade vs. Dowling*, 18 Jur. 728, Q. B.

*Assignment, Voluntary—Incomplete Alienation.*—In order to make a voluntary assignment of a reversionary interest, of a chose in action, or the like, effectual against the assignor, he must at the time of the assignment, have done all in his power to make it available. *Beech vs. Kemp*, 23 L. J. Ch., 539, Rolls.

But a reversionary interest standing in the name of a trustee may be transferred by voluntary deed with notice to the trustee, if the assignor

has no other means to effectuate his intention. *Voyle vs. Hughes*, 23 L. J. Ch. 238, STUART, V. Ch.

*Bailment—Liability of Boarding-House Keeper.*—Declaration that defendant being a boarding-house keeper, received plaintiff with her baggage for reward, as a guest in defendant's house, on the terms, amongst others, that the defendant should "take due and reasonable care" of plaintiff's baggage while in the house. Breach: that by negligence of defendant and her servants, plaintiff's baggage was lost. Pleas: not guilty, and a traverse of the receipt on those terms. Issues thereon: on the trial, it appeared that plaintiff was received with her baggage as a guest, but nothing was expressed as to the care to be taken of the goods. The goods were stolen from the house whilst plaintiff was a guest, and there was evidence that the theft was facilitated by the defendant's servant having left the front door ajar; and there was also some evidence that defendant was aware of habitual negligence of the servant in this respect. The Judge told the jury that a boarding-house keeper was bound to take due and reasonable care about the safe-keeping of the guest's goods; which he explained to be such care as a prudent house-keeper would take of the house for the purpose of protecting her own goods; that the leaving of a door ajar might be the want of such care, but that the defendant was not answerable for such negligence in the servant, unless she had herself been guilty of some negligence, as of keeping such a servant, with knowledge of his habits. Verdict for defendant on not guilty; for plaintiff on the other plea. On a rule for a new trial: held—by the whole Court, that a boarding-house keeper is not bound to keep a guest's baggage safely to the same extent as an inn-keeper; but that she undertakes, by implication of law, although nothing is expressed, to take due and proper care of a guest's baggage; and that neglecting to take due care of the outer door, might be a breach of such duty, and that so far the direction was right. Erle, J., and Wightman, J., held that unless the defendant herself was guilty of the negligence, the act of the servant in leaving the door ajar, was not one for which defendant was responsible; it not being a neglect of any public duty which was owing to plaintiff, and not being a breach of a contract between plaintiff and defendant, but merely negligence of a servant towards his mistress, and that therefore the direction was right. Coleridge, J., and Lord Campbell, C. J., held that the act of the servant was, under the circumstances, an act of the defendant, and that there was no distinction between the personal negligence of the defendant and that of her

servant in her employment, the defendant being equally answerable for both; and therefore they held that the direction was wrong. The Court being equally divided, no new trial was granted. *Dansey vs. Richardson*, 3 E. & B. 144. Q. B.

*Banker—Refusal to Pay Checks.*—Refusal by banker to pay a trader's checks, when sufficient assets, substantial damages may be recovered, without proof of actual damage. *Rolin vs. Steward*, 23 L. J. C. P. 148.

*Bill of Exchange—Alteration in a material part.*—The acceptance of bill of exchange was altered, without the consent of acceptor, by making it payable at a particular place. The acceptor held discharged, though the plaintiff was an endorsee for value after the alteration, and without notice. *Burchpell vs. Moore*, 18 Jur. 727; 23 L. J., Q. B. 261.

*Blank Endorsement.*—Bill of exchange endorsed in blank, and transferred by the endorsee by delivery only, holder takes as against acceptor, any title which the intermediate endorsee had. *Fairclough vs. Pira*; 23 L. J., E & Ch. 215.

*Forged Acceptance.*—A presentment for payment of a bill in pursuance of the terms of a forged special acceptance, is not a good presentment against the drawer, without additional circumstances to make him liable. No presumption that the forged acceptance was on the bill at the time of his endorsement. *Wetton vs. Hodd*, 18 Jur. 630; C. P.

*Lost Bill.*—The loss of a negotiable bill, though unendorsed, given on account of a debt, is an answer to an action for the debt, as well as on the bill. *Crowe vs. Clay*, 18 Jurist, 654; Exch. Ch. (In a subsequent case, JERVIS, C. J., doubted whether this applied to a non-negotiable instrument.) *Charnley vs. Grundy*, 18 Jur. 653.

*Corporation—Quo Warranto—Rights of Crown.*—JERVIS, C. J., POLLOCK, C. B., CRESWELL, J., PLATT, B., and MARTIN, B., the crown cannot grant a charter not open to the right of the subject to have it declared forfeited on breach of a condition in which he has an interest, or through misuser or abuse; PARKE, B. doubting, and TALFOURD, WILLIAMS and CRESSWELL expressing no decided opinion, except that such exercise of power was not to be implied. *Eastern Archipelago Co. vs. The Queen*, 18 Jur. 481.

*Covenant Running with Land—Injunction in aid of Specific Performance.*—Whatever be the doctrine at law with regard to covenants running with the land, one purchasing real estate with notice of a covenant

or agreement affecting the same, will be restrained in equity from a violation thereof. *Coles vs. Sims*, 18 Jur. 683 ; before L. J. J. of App., affirming *Tulk vs. Moxhay*, 2 Phill. 774.

*Deed—Setting aside—Mistake—Family Arrangements.*—If a party is misled, and under the idea that he is discharging legal liabilities, enters into a contract, which he would have resisted if correctly informed, they will be set aside. The compromise of a suit, and of collateral claims arising out of demands, having no legal existence, are not such considerations as will support a contract as a family arrangement when made on erroneous information. *Lawton vs. Campion*, 23 L. J. Ch. 505, Rolls.

*Domicil—Conflict of Laws—Administration.*—Judgments in England will give no priority against assets in England belonging to a testator dying domiciled abroad ; and effect can only be given to them with reference to the law of the domicil. *Wilson vs. Lady Dunsany*, 23 L. J. Ch. 492, Rolls.

*Evidence—Commission to Foreign Country.*—Though on application for a commission to a foreign country it should appear that the mode of examining witnesses in that country differ from the course in England, it is not to be supposed that the evidence will be therefore contrary to the law of England, and the commission may be issued. But if on the trial it appear on the face of the deposition, or by extrinsic evidence, that the examination has been conducted illegally, the whole, or so much as is illegal, will be rejected. *Lumley vs. Gye*, 18 Jur. 466, Q. B.

Per CAMPBELL, C. J. The fact that the examination was conducted by a judge, as in Prussia, would not alone be an objection. *Ibid.*

*Evidence—Usage to interpret Written Contract.*—Cotton was shipped at New Orleans, on board a Liverpool vessel, assigned to a house in the latter port, the bill of lading making it deliverable on “paying freight for it five-eighths of a penny per pound, with five per cent. Primage and Average accustomed.” In an action for the freight, *held*, that evidence was admissible, that by the custom of Liverpool the defendant (the assignee) was entitled to a deduction of three months’ discount from the freight (not in lieu of credit, which was not allowed), though such custom only applied to certain ports in the United States, viz., New Orleans, Mobile, Charleston, and Savannah. *Brown vs. Byrne*, 18 Jur. 700, Q. B.

*Sale by Sample.*—The meaning of an expression in a contract which

indicates the nature of the article contracted for, cannot be altered by any alleged custom of the trade. *Nichol vs. Goltz*, 23 L. J. 162, Exch.

*Executor—Right to Pledge.*—A mortgage of household estates of the intestate's estate, with a power of sale in default of payment, by an administrator, is good. *Russell vs. Place*, 23 L. J. Ch. 441, Rolls.

*Feme Coverte—Separate Estate—Power.*—Feme with life estate in personality to separate use, and general power of appointment by will, does not, by exercising the power, make the property liable to such engagements as would be charges on her separate estate. *Vaughan vs. Vanderslegen*, 2 Drewry, 165.

*Husband and Wife—Articles of Separation.*—Chancery will compel specific performance of articles of separation, enjoin the husband from proceeding in the Ecclesiastical Court for restitution of conjugal rights, till the execution of a proper deed, where the articles stipulate that he shall permit his wife to live separate and apart, as if she were unmarried, without any molestation on his part; and afterwards direct the insertion in the deed of a covenant by him not to compel the wife to cohabit or live with him by any ecclesiastical censures or proceedings. *Wilson vs. Wilson*, 23 Law Times, 134, House of Lords.

*Husband and Wife—Liability of Husband for Fraudulent Representation of Wife.*—No action lies against husband and wife for a false and fraudulent representation that she was unmarried, whereby the plaintiff was induced to take her promissory note as security for a loan to a third person. Though wife liable in general for fraud, yet not where it is directly connected with a contract by her, and forms part of it. *Fairhurst vs. Liverpool Loan Ass.* 4 Exch. 422.

*Infants, Jurisdiction over, when resident abroad.*—The Court of Chancery has jurisdiction over infants who are natural-born English subjects, though born and resident abroad; but, *quære*, whether, except under very special circumstances, it will make an order with reference to the custody of the infant, in a case where the Court sees no means of enforcing compliance with its order. *Hope vs. Hope*, 23 L. T. 182, M. R.

*Quære*, whether the French Court would act as ancillary to the Court of Chancery in England in enforcing obedience to an order made by this Court for the delivery up of an infant, a natural-born English subject resident in France, to the custody of its parent here. *Ibid.*

*International Law—Rights of Neutrals.*—Residence in enemy's country for purposes of trade, though at the same time consul of a neutral power, disqualifies from claiming as a neutral. A neutral cannot claim as mortgagee of an enemy's vessel. *The Aina*, 18 Jur. 681, Adm. Prize Ct.

*Insolvency—What vests in Assignees.*—Action for non-delivery of a machine, whereby the plaintiff was deprived of gains and profits, and his whole business and trade ruined, and himself forced into insolvency, cannot be maintained after vesting order in insolvency, because the right of action passes to the assignee. *Stanton vs. Collier*, 18 Jur. 650, Q. B.

*Insurance—Total Loss—Abandonment.*—Where there has been once a total loss by capture, it is a permanent total loss, unless either the ship be actually restored to the possession of the owner, or they have the power of immediately taking possession, before the abandonment. This principle applied where ship captured by pirates, but recaptured and kept as prize by a Government vessel, after which owners abandoned; and then the ship, while being brought home for adjudication, meeting with bad weather, had to be sold at an intermediate port by the prize-master. *Dean vs. Hornby*, 18 Jur. 623, Q. B.

*Judgment recovered in trover.*—A plea of judgment, recovered in trover, against one person for the conversion of goods, is a bar to an action of assumpsit for the proceeds of the sale of the goods by another, whether he be a party to the conversion or a stranger. *Buckland vs. Johnson*, 23 L. T. 190 C. B.

*Mortgage—Lunatic.*—In an ordinary foreclosure suit the Court will not inquire into the validity of the mortgage on the ground of the lunacy of the mortgagor, but will direct the defendants to try its validity by an ejectment, or by an issue as to the question of sanity. *Jacobs vs. Richards*, 23 L. J. Ch. 557, L. J. J. app.

*Patent—Prior public use.*—Patent for improvement in the manufacture of cast steel, by the use of carbonate of manganese. In an action for infringement, evidence that for eight or ten years before the grant of the patent, five firms had manufactured steel in the manner described in the patent, and had used and sold the steel so manufactured in the way of their trade, three of the firms without concealment, held sufficient to establish such a prior public use as to invalidate the patent; and *quære* per ERLE, J., whether it would have made any difference, that the process of the prior



manufacture had been kept secret, if perfected and sold. *Heath vs. Unwin*, 18 Jur. 601, Q. B.

*Shipping—Charter Party—Usage of port—Reasonable time.*—By a charter-party the master of a vessel, engaged to proceed with his vessel to a particular colliery, and there take on board for the freighters a cargo of coal. Before the charter-party was signed, both parties knew that the colliery was not at work, an accident having happened to the steam engine, and both were told that it would be repaired in a short time, and that the vessel would be loaded in her turn in a few days after the colliery got to work again, according to the practice of the port, which was, that ships were loaded in their regular turns, as they were entered on the colliery books. The freighter had no control over the colliery. The ship was loaded in her turn, but not until several days later than the colliery agent had led the parties to expect. *Held*, that if the steam engine was repaired, and the colliery got to work in a reasonable time after the execution of the charter-party, and if the vessel was loaded within a reasonable time after the colliery got to work, the freighters were not liable to compensate the master of the vessel for the delay in the loading. *Harris vs. Dreesman*, 23 L. J. 210, Exch.

*Shipping—Demurrage—Freighter—Endorsee of bill of lading.*—The freighter of goods, who has entered into a contract with the ship-owner to pay demurrage, the goods being deliverable by the bill of lading to him or his assignees on paying freight, is not relieved from his liability to pay demurrage, although the bill of lading has been assigned before the arrival of the ship, and the goods are parted with by the ship-owner to the assignee without satisfaction of the ship-owner's lien. *Harrison vs. Spaeth*, 23 L. J. 155, Q. B.

*Shipping—Liverpool pilot—Necessity of hiring licensed pilots—Responsibility of owner.*—The Liverpool pilot act enacts that, in case an outward-bound vessel shall proceed to sea without a licensed pilot, the master shall be bound to pay to the first pilot who offers his services the full amount of pilotage. The defendant's vessel took a pilot on board before she left the docks, and was in the river Mersey, with the riggers on board, on the 3d of June, completing the arrangements for her sailing on the following day, when she ran foul of and sank the plaintiff's anchor boat. *Held*, that the vessel was not proceeding to sea within the act, and that, therefore, as it was not compulsory to have a pilot on board, the owners were liable. (*Bennet vs. Moita*, 7 Taunt. 258, has been overruled by *Hammond vs.*



*Rogers*, 7 Moore's Rep. P. C. 160). *Rodrigues vs. Melhuish*, 23 L. T. 177, (Exch.)

*Solicitor and client—Bill of costs.*—A solicitor having lien on certain papers of his client for certain costs, refused to deliver them up, until the client executed an agreement to pay a fixed sum of money in settlement of his bill in the event of the client's succeeding in a suit then pending. No bill of costs was asked or given. The agreement was executed with full knowledge and without pressure. The agreement held binding. *Steelman vs. Collet*, 18 Jur. 457, Rolls.

*Solicitor and client—Solicitor taking benefit under his client's will.*—Where a testator makes a disposition by his will in favor of the solicitor employed by him to make the will, in such language and under such circumstances as that upon the trial at law of an issue *devisavit vel non*, brought by the heir-at-law of the testator, or upon the hearing of the Ecclesiastical Court of a suit touching the validity of the will, the disposition in question would be upheld; this Court will not, on the mere ground that the relation of solicitor and client existed between the solicitor and the testator, interfere, at the instance of the heir-at-law or next of kin, to fix a trust for the benefit of either of them upon the property devised or bequeathed to the solicitor. *Hindson vs. Wetherill*, 18 Jur. 499, 23 L. T. 149. (L. C. and Lords JJ.)

*Statute of limitations—Fraud.*—No answer to plea of the statute, that in consequence of the fraud of the defendant, the plaintiff was prevented from discovering his cause of action before, and that he had commenced his action within six years after discovery. *Imp. Gas Light Co. vs. Lond. Gas Light Co.* 18 Jur. 497.

*Vendor and Vendee—Custody of title deeds.*—Conditions of sale of several lots stipulated that "the purchaser of the largest lot" should have the title deeds; "largest lot" means most extensive, not the most valuable. *Griffiths vs. Kutchards*, 18 Jur. 649, V. C. Wood, (doubted by correspondent, 18 Jur. part ii, 262).

*Warranty—Representative when not.*—A, whose horse is to be sold at auction the next day, sees B, a friend, examining the horse, and says: "You have nothing to look for, I assure you; he is sound in every respect;" to which B replies: "If you say so, I am satisfied." The horse is then sold at auction, without warranty, to B. The previous representation held not to amount to a warranty. *Hopkins vs. Tanqueray*, 18 Jur. 608, C. P.

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IS AN ABRIDGMENT AN INFRINGEMENT OF THE  
COPYRIGHT OF THE ORIGINAL WORK?

"Many cases [are] to be found in the reports, which decide that a *bona fide* abridgment of a book is not an infringement of copyright." It not unfrequently happens that when the foundation of what is without hesitation taken or asserted as an established legal principle, is sought for, it is found to be of no more solid a character than an accumulation of *dicta* made in the course of a series of decisions relating to other branches of the same general subject. There may be in fact not a single case in which the precise point has arisen; and yet *dicta* on that point been so often and so broadly and confidently enunciated, that bearing upon their face the semblance of authority, when the case actually does arise which calls for a direct and positive decision upon the very question, the judicial mind, misled by appearances, may yield to the supposed pressure of authority, and feel compelled to decide upon the maxim *stare decisis* against the bent of its inclination from reason and principle. It may not be without a practical bearing, therefore, to examine the grounds for the *dictum* which stands at the commencement of this article, and which is to be found in the opinion of Mr. Justice Grier in *Stowe vs. Thomas*, (2 Am. Law Reg.

, 210; 2 Wallace, Jr. 547, 566,) where the point before the Court was, Whether a translation into another language is an infringement of the copyright in the original work, where such original work is protected by copyright in the same country in which such translation is printed, published, imported, or offered for sale?

The most recent case upon the point, is *Story's Ex'rs vs. Holcombe et al.*, (4 McLean, C. C. R. 306,) decided by Mr. Justice McLean in the Ohio district in 1847. An injunction was sought by the representatives of the late Mr. Justice Story as holders of the copyright in his "Commentaries on Equity Jurisprudence," to restrain the defendants from printing and publishing "An introduction to Equity Jurisprudence, on the basis of Story's Commentaries, etc., by James P. Holcombe." Defence—that the work complained of was a *bona fide* abridgment of the Commentaries." In the outset of the opinion the Court state, "the decision must turn on the question of abridgment;" and yet by reference to the conclusion of the opinion, it will be seen that an injunction was granted against the first hundred pages of the work complained of, as being a compilation and as such an "infringement of the plaintiff's rights, on the ground that the plan of the Commentaries is copied; and also for the reason that the extracts extend beyond the proper limit for such a work." And this had the same practical effect as an injunction against the whole book. "The remaining two-thirds of the book *may be comprehended under a liberal construction* of an abridgment." There is in this language no positive refusal of an injunction against the remainder of the book on the ground of its being a fair abridgment and therefore no infringement.

But, although not required by the circumstances of the case before him, the learned judge decides that a "fair abridgment" is no infringement. This decision is made solely on the ground of authority, for he expressly states "the reasoning on which the right to abridge is founded, seems to me to be false in fact," and he recognizes the same test of infringement as that suggested by Mr. Curtis, (Copyright p. 240,) viz: "Is the legitimate tendency of the act complained of to injure the original author?" He goes on to state, "But a contrary doctrine has been long established in Eng-

land; and in this country the same doctrine has prevailed. I am, therefore, bound by precedent; and I yield to it in this instance, more as a principle of law, than a rule of reason or justice."

What authorities are cited to sustain this position? First in point of time is *Gyles vs. Willcox*, (2 Atk. 141, an. 1740), where an injunction was asked against a work entitled "Modern Crown Law," alleged to be an infringement of Lord Hale's "Historia Placitorum Coronæ." The injunction was granted on the ground that the work complained of was a "merely colorable" shortening, by which "some words out of the Historia are left out only, and translations given instead of the Latin and French quotations that are dispersed through Sir Matthew Hale's work." In the course of the decision, however, Lord Hardwicke says, "Abridgments may with great propriety be called a new book, because not only the paper and print, but the invention, learning and judgment of the author is shown in them, and in many cases are extremely useful, though in some instances prejudicial, by mistaking and curtailing the sense of the author." This *dictum* was thrown in merely to prevent the decision being considered as an authority for more than the point actually before the Court; a purpose which is defeated, if the reservation properly made is to be regarded as an absolute ruling of the case reserved for decision when it should present itself. It is true that in *Tonson vs. Walker*, (8 Swanst. R. 679,) Lord Eldon, remarks in reply to a suggestion in the course of the argument, "In *Gyles vs. Willcox*, the abridgment contained 35 sheets, the original 276, it was referred to award, and held a fair abridgment and not within the Statute." But as *Gyles vs. Willcox* was decided in 1740, and Lord Eldon was born in 1751, he could not have spoken from any personal knowledge on the subject of the case, and especially when he was but thirteen years old at the time of Lord Hardwicke's death. The remark, therefore, must be taken *cum grano salis*, and not received as authoritative as to the final result of *Gyles vs. Willcox*, when no mention of it subsequent to the reference, is made by any of the reporters.

An *Anonymous Case* in Lofft, 775, (an. 1774), is the next authority cited by Mr. Justice McLean. The application was for an

injunction against Newberry's abridgment of Dr. Hawkesworth's Voyages, and was heard before Lord Bathurst, whom Lord Campbell, (Lives of the Lord Chancellors, Chap. 52, Vol. 5, p. 886, Amer. edit.) pronounces "little qualified for intellectual pursuits." Had it not been for the fact that Sir William Blackstone was consulted upon the case, the intrinsic weight of this authority would be very little. The ground upon which it is rested is, that "to constitute a true and proper abridgment of a work, *the whole must be preserved in its sense*; and then the act of abridgment is an act of the understanding employed in carrying a large work into a smaller compass, and rendering it less expensive and more convenient both to the time and use of the reader, which made an abridgment *in a measure* a new and meritorious work." And, therefore, "An abridgment when the understanding is employed in retrenching unnecessary and uninteresting circumstances which rather deaden the narration, is not an act of plagiarism upon the original work, nor against any property in the author of it, but an allowable and meritorious work." If the principle here laid down is a just one, it would authorize some of the most barefaced literary thefts. This abridgment would seem from the language of the Chancellor to have been a mere retrenchment of what was considered by Mr. Newberry as "unnecessary and uninteresting" matter; and must, therefore, be considered as overruled by the late case of *Bohn vs. Bogue*, (10 Lond. Jur. 420, an. 1846,) where Mr. Hazlitt the editor of "*A Life of Lorenzo de Medici*," published by defendant, avowedly founded upon Mr. Roscoe's "*Illustrations of the Life of Lorenzo de Medici*," the copyright of which was held by plaintiff, "first of all threw overboard as utterly worthless—as of no use whatever to anybody—of no interest whatever—the greatest part of the work" which he made the basis of his own publication, but used and copied what he thought of most value; and an injunction was granted. And the note of the case of *Trusler vs. Murray*, (an. 1789, 1 East, 362, n.) throws much doubt on the case in *Lofft*. "In this case though some parts of the chronological work were different, yet in general it was the same, and in particular pages 20 to 84 was a literal copy. Lord Kenyon was of opinion that plaintiff could recover. Lord

Bathurst had been of that opinion, and he thought rightly, with respect to the publication of some original poems by Mr. Mason with others before published, *and the like with respect to an abridgment of Cook's Voyages around the World.*"

The third and last English case relied upon is *Bell vs. Walker*, (1 Bro. C. C. 451, an. 1785.) Passages were read from the two works to show that the facts and even the terms in which they were related in the book against which an injunction was prayed were taken frequently *verbatim* from the original work. Sir Thomas Sewell, M. R. said, "If this was a fair *bona fide* abridgment of the original work, several cases in this Court had decided an injunction should not be granted. It had been so determined with respect to Dr. Hawkesworth's *Voyages*. He should not decide at present *whether it were such*, or a piracy from the former. But he had heard sufficient read to entitle the plaintiff to an injunction till answer and further order." Now the only reported prior case touching on abridgments in addition to those already commented upon is *Dodsley vs. Kinnersly*, (Ambler, 403, an. 1761,) in which the narrative part of Johnson's *Rasselas* had been published by defendant, omitting the moral reflections. And Sir Thomas Clark, M. R., in delivering his opinion refusing an injunction, says, "What I materially rely upon is, that it could not tend to prejudice the plaintiffs when they had before published an abstract of the work in the London Chronicle." The authority of *Bell vs. Walker* can be regarded as of no more weight than can be attached to a *dictum* entirely uncalled for by the case before the Court. The case of *Read vs. Hodges*, (an. 1740,) is cited in *Gyles vs. Willcox* as if it was an authority upon the question with reference to abridgments; but the infringement complained of was in fact a *verbatim* reprint of plaintiff's work, only several pages left out bodily.

The only American authority cited to sustain the position that in this country the same doctrine has prevailed, is *Folsom vs. Marsh*, an. 1841, (2 Story R. 106.) The question in this case arose upon the publication by defendants, of a *Life of Washington*, which was alleged to be an infringement of Mr. Sparks' *Life and Writings of George Washington*. Three hundred and nineteen pages of defend-

ants' work had never appeared in print before they were published by plaintiffs, and were reported by the Master to whom it was referred to ascertain the facts (and his report was not excepted to) to have been copied from plaintiffs' book. And upon this ground, viz: that parts of the work "imparting to it its greatest, nay, its essential value" were copied from the plaintiffs', an injunction was granted. "But," says the learned judge, "if it had been the case of a fair and *bona fide* abridgment of the work of the plaintiffs it might have admitted of a very different consideration." And in the preliminary or introductory part of his opinion he uses the following language. "It has been decided that a fair *bona fide* abridgment of an original work is not a piracy of the copyright of the author. But then, what constitutes a fair and *bona fide* abridgment in the sense of the law is one of the most difficult points under particular circumstances, which can well arise for judicial decision. It is clear, that a mere selection—a different arrangement of parts of the original work, so as to bring the work into a smaller compass, will not be held to be such an abridgment. There must be real substantial condensation of the materials, and intellectual labor and judgment bestowed thereon; and not merely the facile use of the scissors; or extracts of the essential parts, constituting the chief value of the original work.'" As the case, however, did not call for the decision of the question now under examination, it cannot be regarded as expressly ruling the point; although a *dictum* of Mr. Justice Story is entitled to much weight. To sustain this *dictum*, the cases of *Whittingham vs. Wooler*, (2 Swanst. R. 428) and *Tonson vs. Walker*, (3 id. 672,) in addition to the cases of *Dodsley vs. Kinnersley*, and *Gyles vs. Wilcox*, already mentioned, are cited. *Whittingham vs. Wooler* was a case where the defendant had inserted in a periodical work of theatrical criticism, detached extracts to the extent of six or seven pages from a farce, the property of the plaintiffs, interspersed with criticism. It was not pretended or argued that any question as to abridgment was presented by the case. In *Tonson vs. Walker*, an injunction was granted to restrain the publication of Dr. Newton's Notes to Milton's Poems, notwithstanding a small addition of original commentary by the defendant. It was a case of *verbatim copy*



ing; and yet Lord Eldon travels out of the way to say, that “ a fair abridgment would be entitled to protection.”

Such are the authorities by which Mr. Justice McLean felt himself bound, contrary to the dictates of his own reason on grounds of principle. The only remaining cases upon which the *dictum* of Mr. Justice Grier in *Stowe vs. Thomas* can rest, are *Butterworth vs. Robinson*, (5 Ves. 709;) and *Gray vs. Russell*, (1 Story R. 11.)

The report of *Butterworth vs. Robinson* is exceedingly meagre; but shows that the work complained of and against which an injunction was granted, was with the exception of leaving out some parts of the cases, a mere copy *verbatim* of among others the Term Reports, of which the plaintiff was proprietor, comprising all the cases published in that work. There is no discussion of principles in the decision of the Lord Chancellor as reported; and the case goes no farther than to decide that a *verbatim* reprint of parts of an original work cannot be covered up under the title of an abridgment. In *Gray vs. Russell*, it was not pretended that the work complained of was an abridgment, for so literal had been the transcription that the defendant “incorporated the very errors” of plaintiff’s work. But Mr. Justice Story after stating, that “ In some cases, indeed, it may be a very nice question what amounts to a piracy of a work or not;” and entering into a discussion with reference to extracts for the purpose of criticism and review,—abridgments,—and Law Reports; says expressly, “ We are spared from any nice inquiries of this sort in the present case.” The point in question did not come up for decision.

It would seem, therefore, from an examination of the authorities, that there is in reality no case in which the question has been presented for direct decision, Whether an abridgment (no matter how *bona fide*) is an infringement of the copyright of the original?—

Should it then be regarded as finally and definitively settled? The reason of other judicial minds besides Mr. Justice McLean’s, does not assent to what seems to have been tacitly received as an established principle. Lord Campbell (Lives of the Lord Chancellors vol. 5. p. 72, Amer. edit.) says, “ I must own, that I much question another rule he [Lord Hardwicke] laid down with respect to literary property, although it has not yet been upset. *Gyles vs.*



*Willcox*, (2 Atk. 142) and see *Lofft*, 775. I confess I do not understand why an abridgment tending to injure the reputation, and to lessen the profits of an author, should not be considered an invasion of his property." When an actual case presenting the precise point is presented for judicial determination and expressly decided, it will be time enough to regard the question as settled by authority.

Till then, however, it must still be regarded as open for discussion.

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*In the Circuit Court of the United States for the Hartford District.*

THE AMERICAN PIN COMPANY vs. THE OAKVILLE COMPANY ET AL.

1. The extent of the rights secured to the patentee stated, and the case of *O'Reilly vs. Morse* cited and affirmed.
2. The means specified in the patent to produce the effect, and nothing more, are secured to the patentee, and there can be no infringement unless the same substantial means are used in both the plaintiffs' and defendants' machines.

The facts of this case fully appear in the opinion of the Court, which was delivered by

INGERSOLL, J.—The complainants, by their bill seek to enjoin the defendants from using a machine to paper pins, the right to use which, they claim to be exclusively vested in them. The foundation of their claim rests upon two certain patents, the right to which Patents, with the privileges by such patents granted, they now have by virtue of assignments from the patentees. One of these patents, was issued to Samuel Slocum, and bears date the 30th day of September, A. D. 1841, and was to run for fourteen years from the last mentioned date. The other Patent was issued to John J. Howe, and bears date the 24th of February, A. D. 1843, and was to run fourteen years from the 5th day of December, A. D. 1852. The validity of these patents is not contested by the defendants. They admit that the complainants have all the rights which these Patents purport to grant. They admit further, that they are using a machine for papering pins; but they deny, that by such use, they have infringed upon any of the rights so granted by such patents.

The defendants claim a right to use the machine for the papering of pins, which they are operating, upon the ground that by such use, they do not infringe upon any rights granted by such patents, or either of them. They claim also that the right to use such machine, so operated by them is exclusively vested in them by virtue of a patent granted to Chauncey O. Crosby, and which last mentioned patent, they have by virtue of an assignment from the patentee.

There has been heretofore, at times, some diversity of opinion, as to the extent of the rights, secured to an inventor or discoverer, by the patent issued in his favor. The Supreme Court of the United States have however, settled and determined, what rights are so secured to the patentee; so that now, there can be no diversity of opinion on the subject. In the case of *O'Reilly et al. vs. Morse, et al.* 15 Howard's Reports, page 62, the rule as laid down by the Chief Justice, in giving the opinion of the Court, is in substance as follows :

He who discovers that a certain useful result will be produced in any art, machine, manufacture or composition of matter, by the use of certain means, is entitled to a patent for such discovery, provided he sets forth in his specification, the means he uses to produce such useful result, in a manner so full and exact, that any one skilled in the art or business to which it appertains can by using the means he specifies, without any addition to or subtraction from them, produce precisely the result he describes. And if this cannot be done, by the means he describes, the patent is void. And if it can be done then the patent confers on him the exclusive right, to use the means he specifies, to produce the result or effect he describes, and nothing more. And it makes no difference in this respect, whether the effect is produced by chemical agency or combination, or by the application of discoveries or principles in natural philosophy known or unknown, before his invention; or by machinery acting together upon mechanical principles. In either case he must describe the manner and process as above mentioned, and the end it accomplishes. And every one may lawfully accomplish the same end, and without infringing the patent, if he uses means substantially different from those described. But if the means used to accomplish the

same end, are substantially like those which the patentee describes, the patent has been infringed, and the one using them must be responsible for such infringement.

The rules thus laid down must govern this case. The patent does not secure to the patentee the result or effect produced, but only the means described, by which such result or effect is produced.

The means which he specifies, to produce the result or effect, are secured, and nothing more. And all other means to produce the same result or effect and not patented to any one, are open to the public. A mere change in the form of the machinery, however, or the means specified, by which the result or effect described is produced; or an alteration in some of the unessential parts, or a substitution or use of known equivalent mechanical powers, not varying essentially the machine, or its mode of operation or organization, will not make the new machine a new invention. The patentee may however limit his claim, in his specification, to one particular form of machine, and thus exclude all other forms, though such other forms, would embody his invention, and thereby not secure to himself, the whole that he has invented. In such a case, he is secured only in the particular form claimed. The patent law was intended to secure to the inventor, his whole invention or discovery, but not unless he claimed to be secured, in the whole. And if he claims only a part, or some particular form, such part, or particular form only is secured to him. No more can be secured by the patent, than has been invented or discovered; and no more can be secured, than is claimed to be secured in the specification.

In the case of *Winans vs. Denmead*, 15 Howard, 830 the substantial means used by the defendant to accomplish the object sought, were the same as those described and claimed in the specifications to the plaintiffs' patent. There was no other change, than a slight change of form not varying in substance the means used by the plaintiff and set forth and described in the specification to his patent. And as a mere change in the form of the machinery, or the means specified, by which the result is produced, not varying essentially the mode of operation of the thing patented, will not vary its organization, or be deemed a new or different invention, the do-

fendant was deemed to have been an infringer of the plaintiffs' rights secured to him by his patent.

The invention of Slocum as described in his specification, is a "machine for sticking pins into paper" in a row. It consists of a horizontal plate as described, with as many grooves, as the number of pins, intended to be stuck in a row; which grooves are of sufficient length and depth to receive one pin and one only; a sliding hopper so constructed as to hold a number of pins, one directly over the other in a horizontal position, and so made to slide directly over the grooves, as to deposit one of the pins in each groove by gravitation; and a sliding plate or follower, upon the front edge of which project a system of points or wires corresponding with the grooves, so that when the sliding plate or follower is driven forward, the wires enter the grooves, in which the pins are separated, and drive forward the pins, which are thus made to perforate the previously adjusted folds of a folded and crimped paper, which is held between clamps. And in the specification Slocum claims as his invention, the plate with grooves, as described, for separating the pins, the sliding hopper, which deposits the pins in the grooves as described; and the sliding plate or follower, with the wires attached thereto, in combination with the groove plate as described, and also these in combination with the hopper as described. The invention of Howe, as described in his specification, is for an improvement on Slocum's machine for sheeting pins, that is, for sticking pins in rows in sheets of paper. The machine of Slocum did not crimp the paper. But the paper was crimped in the old way by a separate operation, and then taken out of the crimping apparatus, and placed in clamps, and while in such clamps, and out of the crimping jaws, the pins perforated through the crimps previously formed, and in that way were sheeted. The improvement of Howe upon the machine of Slocum, crimped the paper, and the pins were stuck in rows in the paper, while the paper was within and held by the crimping apparatus.

This improvement consisted of transverse notches made in the crimping jaws of the old crimping apparatus, so that the pins could enter at proper distances between the crimping jaws, and perforate the paper, while the same was being crimped. Before this improve-

ment, no method was known by which the pins could be made to penetrate the paper, and thus be sheeted, while the paper was under the process of being crimped. The old mode was to stick the pins after the paper had been crimped. Howe's improvement was by means of these transverse notches, to stick the pins, while the paper was in the crimping process, when it was being crimped, and while the crimper, which crimped the paper, held the paper in the form that it was crimped. It was not to sheet the pins, after the paper had gone through the crimping process, and had passed out of the crimping jaws. He in substance took the old English crimping bar, and made transverse notches in it, at suitable distances between the jaws, so that the pins could penetrate through these notches, into and through the crimps of the paper when the paper was within the crimping jaws, and in the process of being crimped.

The patent which was granted to Crosby, bears date the first day of April, A. D. 1851. The machine which the defendants are operating, is constructed substantially according to the specifications annexed to that patent. Crosby in his specification claims to be the inventor of "a new and useful machine for sticking pins," and the patent is granted to him according to his claim for "a new and useful machine for sticking pins on paper." The specification and claim are not for an improvement on Slocum's machine, or on Howe's machine for sticking pins; but for an independent machine, governed by different principles; for a machine to produce a result, by means substantially different from the means secured to either Slocum or Howe, to produce a like result, to wit, the "sticking of pins on paper." The patent is *prima facie* evidence, that Crosby has an exclusive right to that which the patent purports to grant; that he is the first inventor of the machine specified and described in his specifications; that he is the first inventor of an independent machine, governed by different principles, and using means, substantially different from the means used by either Slocum or Howe, to produce the like result. *Corning et al. vs. Burden*, 15 Howard, 252. The patent therefore to Crosby affords *prima facie* evidence, that the means described by him in his specifications, to produce the result of sticking pins on paper, are substantially different from the means described either by Slocum or Howe to produce the like result.

And the complainants, to succeed in their application, must counteract this *prima facie* evidence, by sufficient countervailing testimony.

The object of Crosby's machine, is to stick pins in a fillet of paper across the strip of paper, the crimps being length-wise of the paper; to crimp the paper in that way, and coil the fillet, when stuck, into a roll of any convenient size; so that the heads of the pins will be presented on the disk of the roll, and all by one continued operation. The essential parts of the machine, as operated by the defendants, or the substantial means by which the desired result of sticking the pins on paper is produced, are crimping rollers, by which the paper is crimped; an inclined channel way formed by two bars, by which the pins are made to slide down in a verticle position, hanging by their heads, between the two bars; a revolving screw, one end of which is placed at the bottom of the channel way, and by revolving, at each revolution is made to take in its thread, from the bottom of this channel way, one pin at each revolution, from the body of pins in the channel way, and separate the same from the body of pins, and carry it by the mechanical force of the revolution of the separating screw, to the other end of the screw, to change the pin from a vertical to a horizontal position, and at the end of the screw to which the pin is carried, to cause it to drop, in a horizontal position into a groove-channel; and a punch at the head of the pin, as it is dropped into the groove-channel, which by machinery is made to drive the pins forward at regular intervals, as fast as they drop into the groove-channel, into the crimped paper, after it has passed out of the jaws of the crimping rollers. When the paper is stuck, it has, in the place where stuck, passed out of the crimping jaws: and during this operation, one end of the paper is held in a rigid state by the crimping rollers, and the other end by the coiling roller. The paper is stuck on its passage from the crimping rollers to the coiling roller; and as the paper is stuck, it is coiled into a roll. The machine is automatic, while other machines known before, are not so.

The object of Slocum was to paper the pins at given specified distances apart. And for that purpose, he used a plate, with a cer-

tain number of grooves in it, into which the pins were placed by certain machinery, and through which grooves the pins were pushed into the paper. The distances apart, at which the pins were pushed into the paper were regulated and controlled by the distances of the grooves in the plate, and by these distances only. And his machine was so organized as to regulate the distances at which the pins should be separated and stuck into the paper by the distances apart of the grooves in the plate. This was a mechanical law of his machine. There is no such mechanical law of the defendants' machine.

As in the machine of Crosby there is only one groove, through which the pins are pushed, one at a time, into the paper, the distances apart at which they are pushed into the paper by his machine, cannot be regulated by any such mechanical law. These distances therefore are dependent upon some other mechanical rule; upon some other mechanical organization. In Slocum's machine, these distances are regulated by one organization. In Crosby's machine they are regulated by another and different organization. In Slocum's machine, the distances apart of the grooves in the plate, control the manner in which the pins are placed in the paper. In Crosby's machine, an entirely different organization of the machine controls the manner in which the pins are placed in the paper.

Before the invention of Slocum, grooves or channels had been used, in which to place the pins, with the view to push them into paper, and they had been pushed in, in various ways. The grooves used by him as the channel to push the pins into the paper, were also used to separate the pins; as a channel to deposite the pins one by one in each groove, as they dropped from the hopper, when the hopper passes over the plate. Previous to his invention, the separation had been made by hand, and he invented a particular mode of separation, other than by hand, and set forth in his specification the particular means he used to produce the result. The plate with grooves as he described it, for separating the pins, he claimed for his invention. He also claimed the sliding hopper, which passed over the plate, and deposited a pin in each groove, as his invention. He also claimed the sliding plate or follower with the series of wires attached thereto, as described by him, in com-



bination with his groove-plate as described; and these also in combination with the sliding hopper as described. This is all he did claim. Grooves, as such merely, through which the pins were pushed into the paper he did not claim. The object of his machine was, to separate the pins, from a pile or mass of pins, and place them in channels at suitable distances apart, to be pushed into the paper, and then by means of the plate, with the series of wires attached as described, to push them into the paper.

The instrumentalities or substantial means, in Slocum's machine, by which the pins are separated from a pile or column, preparatory to being pushed in the paper, are a hopper, and a bed containing grooves of the exact size of the barrel of the pin. And to effect this separation, the hopper must either slide over the plate with grooves, or the grooved plate must slide or otherwise pass under the hopper. And to enable the pin to be separated, it must be in the hopper in a horizontal position, or nearly so.—The separation cannot be accomplished by that machine, unless the hopper slides over the plate, or the plate slides, or in some other way passes under the hopper. Without one of these operations, the machine, for this purpose is useless. One of these operations is essential to it. It is not a Slocum machine, for separating, without one of these operations.

Neither of these operations can be found, either in form or in substance, in the Crosby machine.—There is no hopper in Crosby's machine, unless the inclined channel-way, in which the pins hang by their heads, in a vertical position, be considered as a hopper. That if it be considered as a hopper, does not move. It is stationary. Of course, it neither slides nor passes over anything. From the lower extremity of the inclined channel-way, the pins are taken one by one, by the thread of a screw, while revolving, and while the pin is vertical, and by force of mechanical power, the pin is carried in the thread of the screw, to the other end of the screw, and there deposited by the screw, in a horizontal position in a groove-channel. The screw while operating, has no motion, but a revolving motion. During the whole time, it remains in the same space. It neither moves forward nor back. There is then nothing



in the machine which, either in form or in substance, has any resemblance or similitude to the sliding hopper, sliding or passing over the recesses of the plate to receive the pins, as they drop from the hopper, or recesses for receiving pins, sliding or passing under a hopper. While in Slocum's machine, one of these processes must take place. And without one of them, a machine for this purpose cannot be a Slocum machine.

In the Slocum machine the recess of the plate, which receives the pins separately from the hopper, must be of the exact size of the barrel of the pin. In the Crosby machine, the recesses in the thread of the screw, which receive the pins, and by which they are transported to the other end of the screw, and which it is claimed, are a mechanical equivalent for the recess in the plate, with grooves in Slocum's machine, need not be of the exact depth or breadth of the barrel of the pin. They may be of any size, provided they are not sufficiently large to enable the head of the pin to fall through. The essential means therefore used in Crosby's machine, to bring about the result, to wit, a separation of the pins from the pile or column, are substantially different from the means used in Slocum's machine, to produce the same result. In this respect the two machines operate differently, and depend upon distinct organizations. The same substantial means are not used in each.

The mode in which the pins are pushed into the paper by the defendants' machine, is by a punch applied to the head of the pins, after they are deposited by the screw in the grooved-channel, by which the pins are made, one by one to penetrate the paper, in and through the crimps. Slocum does not claim as his invention or discovery, the mode generally of pushing pins through a grooved-channel into paper, by means of a punch applied to the head of the pin. The state of the arts, as shown to exist prior to the time of his invention, shows that he could not with success have made any such claim. His claim is for his plate, with a series of wires attached in combination with the grooved plate, as described by him, by which combination, a row of pins is stuck by one operation. The mode therefore, adopted by the defendants in their machine, is not embraced in Slocum's claim. They have a

right therefore to use it, notwithstanding the patent granted to him. From the description already given of the Howe machine, and of the Crosby machines as exhibited on the trial, it appears manifest, that the mode of operation of one, as it respects the improvement or invention as claimed by Howe, is different from the mode of operation of the other. Howe's invention was but an alteration of the old English crimping bar, by the cutting of transverse notches through the bar, where the two jaws meet; to enable the pins to pass through these notches, and thereby stick the paper, while it was within the crimping jaws, and while it was being crimped. The notches or apertures of some kind were an essential means to effect the result, which Howe designed by his invention. Without them, his improvement did not exist. There are no notches or apertures, in Crosby's crimping rollers, and nothing which bears any resemblance or similitude to them. The pins are stuck, not when the paper is within the crimping jaws, but after it had passed out of them. The device of Crosby is essentially different from that of Howe. The pins are stuck by Howe's invention while the paper is within the crimping jaws, by means of notches or apertures in the crimping bars. No such means are used by Crosby. The principles of the two machines, in their modes of operation, and in the means used by each to effect the result accomplished are different. They are not therefore identical. One is not an infringement upon the other.

With this view of the case, the decree must be that the complainants' bill be dismissed with costs to the defendants.

In the above opinion Judge Nelson fully concurs.

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*New York Superior Court—Special Term, November, 1854.*

MORRIS KETCHUM ET AL vs. THE BANK OF COMMERCE OF NEW YORK.

1. Where stock sold by an avowed owner, dealing as owner, turns out afterwards to be spurious and void, by reason of its having been illegally issued, the purchaser may recover back the price paid, though the seller was ignorant of his want of title.

2. A pledgee of stock on collateral security, with power to sell at public or private sale without notice, and to assign coupled with a blank power for that purpose, who has actually transferred the stock into his own name, stands as to third persons in the light of owner, though himself still subject, it seems, to the pledgor's right to redeem; and is therefore liable to an action by a purchaser from him for the price paid, in case the stock turns out spurious.
3. The principles which govern a common law partnership, are in general applicable to a Joint Stock Company, whether incorporated or not, except so far as modified by statute, or special rules of law. The introduction of new members into such association can, hence, be only authorized by joint consent; but this consent may be exercised either on each special occasion, or may be delegated to a particular, without power to redelegate it to an individual. The issue of certificates of stock in such association, being the introduction thereinto, of new partners, falls within this principle.
4. *Held* on the construction of the charter of the New York and New Haven Rail Road Company, that a resolution of the Board of Directors of that company, by which Robert Schuyler was appointed "transfer agent" of its certificates of stock, was a valid delegation of power, and that certificates of stock issued by Schuyler as such agent were binding on the Company.
5. The limitation of the amount of capital stock of the Company, in its charter, *held* not to prohibit the Board of Directors, nor their agent thus appointed, as regards third persons, from increasing the number of shares of stock, beyond the proportion between their par value and the capital stock.
6. The registration of certificates of stock in the books of the Company, though made a pre-requisite to the right of voting or of exercising any control in the management of the Company, is not necessary to a valid title in the stock itself; and and so the absence of a power to transfer will not affect the rights of a *bona fide* purchaser of a certificate of stock; he would thereby only become the equitable instead of the legal holder, but with the right to procure a transfer on the books of the Company.
7. Where a transfer agent appointed by the Directors of an Incorporated Joint Stock Company, has fraudulently over issued stock, a director taking such stock directly from the agent is chargeable with constructive notice, especially where the fraud would have been discoverable by an inspection of the books of the Company. But this does not apply, where he purchases from a *bona fide* holder; and query, whether such constructive notice would affect a firm of which the director was a member.

This action was brought to recover from the defendants the sum of \$25,000, with interest, paid by the plaintiffs, upon a transfer of 370 shares of stock of the New York and New Haven Railroad Company. This stock had been pledged to the Bank of Commerce by the firm of R. & G. L. Schuyler. Various grounds for the de-

mand are set up in the complaint; but the main question depended upon the alleged illegality and valueless character of the stock, as having been fraudulently and falsely issued,

Messrs. *Ketchum* and *G. Wood*, for Plaintiffs.

Messrs. *Silliman* and *D. Lord*, for Defendants.

The opinion of the Court was delivered by

HOFFMAN, J.—The course adopted in adducing the evidence, and the arguments of counsels in this cause, have led to the consideration of the validity of the stock of the New York and New Haven Railroad Company, issued by the late transfer agent, to an amount exceeding one million seven hundred thousand dollars. I am now satisfied that the case cannot be decided without passing upon that question. I approach it with anxiety and distrust. The interests involved are of startling magnitude, and the questions grave and novel. An obscure and untrodden field is before me, and there are no lights kindled by the wisdom and labors of former judges to mark out the path. Such considerations urge me to a protracted and deliberate examination; but I shall fulfil a higher duty to the community by a prompt decision, which will speed the cause upon its way, for the matured determination of the general term of this Court. I shall consider the case under the following heads:—

1. The position and rights of the parties growing out of the presentment and refusal of the check for \$10,000, and the ground assumed by the Bank of Commerce for such refusal.

2. The facts attending the possession and transfer of the securities held by the bank to the plaintiffs, and the nature and evidence of the apparent title to the 370 shares of stock made over to them.

3. The ground of the proposition of the defendants, that in point of fact the transfer made to the plaintiffs, did cover and represent undoubted stock.

4. Whether the action to recover back the price can be maintained upon the assumption, that the stock acquired was utterly void, and vested the plaintiffs with no right or interest whatever.

made at the trial, and the only question is whether there is an implied warranty."

In *Chapman vs. Speller*, the question of warranty, or right to recover, on failure of title to what was contracted for, did not arise. This is the language of the Court. The party had bought only the right which the vendor had acquired at the sheriff's sale. That was merely the title and interest of the judgment-debtor. But the following important authorities are closely applicable to the present case, as now considered. *Jones vs. Ryde*, 5 Taunton, 488, was this: The defendants were bill brokers, and possessed of a navy bill, which purported to have been issued by the Navy Board, to have been registered on the 13th of July, 1813, and to be payable on the 15th of October, 1813, drawn on the Treasurer of the Navy, to Boll & Hobbs, on their order, for the sum of £1,884 16s. 10d. It seems that, on the face of the bill, the property tax was deducted, showing a result of £1,883 16s. 3d. The bill came into the hands of the defendants, who procured the plaintiffs to discount it, and received the avails. It appeared that the bill issued from the transport office, for £884 16s. 10d., and before it was discounted, some person had altered it, by prefixing the figure 1 to the figures 884 and 883 in the several places in which they occurred, and prefixing the figure 1 to each of the dates of the 7th of July and 5th of October. All the parties were unconscious of the alterations. The true amount, however, had been paid by the navy office, and the present action was brought to recover the difference, about £1,000. The action was for money had and received, and was sustained. C. J. Gibbs observed: "Both parties were mistaken in the view they had of this navy bill; the one in representing it to be a navy bill of this description, viz., genuine; the other, in taking it as such. Upon its afterwards turning out that the bill, to a certain extent, was a forgery, we think he who took the money ought to refund it to the extent to which the bill is invalid. . . . In the present case, the navy bill is not such as it purported to be, and therefore the plaintiff is entitled to recover. A case somewhat similar very frequently occurs in practice, to which I should not refer as genuine law, but that it is said by my brother *Lens* to be

sanctioned on the authority of a case so decided at *nisi prius* by Mansfield, Ch. J., viz: where forged bank notes are taken. The party negotiating them is not, and does not profess to be, answerable that the Bank of England shall pay the notes; but he is answerable that the bills are such as they purport to be. In *Westropp vs. Solomon*, 8 Common Bench Rep. 345, the case, as far as the present question is concerned, was this: A share-broker and member of the Stock Exchange was employed to sell certain certificates of scrip of the Buckinghamshire, &c., Railroad Company. He sold the certificates, and handed over the proceeds to his employer. The certificates were found to be forged, and the broker, under certain rules of the Stock Exchange, was called upon, and paid to the purchaser a certain value as for genuine certificates, which exceeded the amount for which he had sold the scrip. For this amount he brought his action. The employer, under a count for money paid, deposited in Court the sum he had received as the avails of the sale. The question arose as to the excess which the broker had been compelled to pay. There was also a count as upon a promise that the certificates were genuine. It may be noticed that these regulations of the Board bound its members to compliance with a resolution like that in question, or to be expelled. It was held that there could be no recovery on the special count, there being no promise, express or implied, that the shares were genuine; that under the account for money received, the broker could only recover the amount paid by him to his employer, and that the resolution of the Board could not affect the latter so as to make him answerable for the excess. In delivering the opinion, Maule, J., says: "The defendant employed the plaintiff to sell these identical shares, who sold them according to that employment. The question is, what is the result of such a sale when the certificates turn out not to be genuine. There was no fraud or negligence on either side. The certificates were such as to deceive everybody who had anything to do with them. Still they were invalid. There cannot be a doubt, then, that the vendees would be entitled to recover back the money they had paid for them." Nothing has been cited, nor have I dis-

covered any authority sufficient, to overthrow or impair these cases. I cannot see why they do not determine the point now considered. Whether the offence is indictable as a forgery, has been doubted by able counsel, but we have the doctrine of Chief Justice Abbott, that a combination to fabricate shares of a company beyond the stipulated number, constitutes an offence punishable in a criminal way. *Rea vs. Mott*, 2 Carr. & Payne, 521.

It is next urged on behalf of the defendants, that they were never owners; never affirmed themselves to be owners, nor dealt as such in relation to this stock, but that throughout, they negotiated as pledgees, acted as pledgees, and transferred the stock in that capacity, and in no other; that they looked throughout to the Messrs. Schuyler, the true owners, for every authorization and source of their acts, and obeyed their directions, and assigned nothing, and professed to assign nothing, but the mere interest of pledgees, which, on the requisition of the firm, they were absolutely bound to do. I have been greatly pressed with the argument, of which this is a brief summary; but, after much consideration, I think it is not conclusive. In the first place, it is to be remembered that the cashier, on the day of the known insolvency of the firm, (the 30th of June,) attempted to have a transfer of the stock made to the president of the bank, and would have procured it, had he applied a few minutes earlier. In the next place, he did effect the transfer on the morning of the 1st of July, before 11 o'clock, from his own name to that of the president, and received the new certificate about 12 o'clock, for 370 shares, having surrendered the two of 200 and 170 respectively. Again, the order of the firm authorized an assignment of the securities, and the arrangement was consummated by a delivery of the new stock certificate, with a blank power to the plaintiffs to transfer, signed by the president. The law, in respect to the sale of stock pledged, I take now to be, that the party, after default, may sell it at auction upon reasonable notice of the time and place, to the owner. If any other mode is provided in the contract, that will govern. *Brown vs. Howard*, Superior Court, T. R., 497. In both of the notes in question, the agreement is, that the stock may be sold at the board of brokers, or at public or private sale, at the option of the bank, and



without notice. I have had occasion to see several printed forms, in which the provision for a sale is the same. Although such a clause would, I think, be construed to mean a sale to a third person, yet there can be no legal objection to the pledgee of stock placing himself, under his power, precisely in the position of a mortgagee of land, who takes possession. I speak of the general law, not as affected by our statute. If so, the pledgee holds the stock, as owner, against every one but the pledgor, or those under him, who may have a right to redeem—a right to be enforced by calling for the transfer of an equal number of shares. The bank, in this case, did not exercise its power to sell at public sale, or at the board of brokers. But it is another question, whether it did not exercise the power of selling, at private sale, without notice, when it first caused the transfer to be made, which vested it with every recognized indication and evidence of ownership, and then transferred the stock to the plaintiffs. Again, the reason of allowing a recovery in cases like these, is, that money was paid for what was deemed an existing right, and when it is proven to have no existence, the party receiving ought not to retain it. Now, whether he got the money as pledgee or owner, does not appear to be of material consequence in such an aspect of the question. In the case of *Fatman vs. Loback*, 1 Duer Rep. 354, the Superior Court treat the filling up a blank power attached to a certificate of stock, and delivering them to another, as a conversion of a previous equitable title into a legal one; and they held that, whether this was done for the purpose of selling or hypothecating, made no difference as to the rights of a subsequent holder. I conclude that this action would lie to recover back the sum paid, deducting the \$10,000, upon the assumption of the stock transferred being proven to be void and valueless.

5.—This consideration leads me inevitably to the question as to what are the rights and position of the holders of such fabricated stock, in relation to the company. I have before stated that as to the shares in question, they are plainly portions of this stock, whatever obscurity may attend the tracing of the rest. I cannot but add my fixed conviction that a vast mass of the disputed stock can be fol-



lowed and identified, and I believe that, could a competent tribunal prescribe some few and reasonable rules of appropriation and adjustment, the task would not transcend the power of mercantile ability to mark the whole. But it is enough in this instance, that I find these shares stamped clearly and indelibly with the sign of their birth in a fraud and fabrication. Is the railroad company and its innocent stockholders bound for these shares? and, if so, what is the nature and extent of their liability? These are inquiries which have stirred the mind of the commercial community, in a degree rarely known in this country, and which have evoked the exercise of the highest professional ability and learning in this, and our sister State of Connecticut, to meet and to solve them. It is unnecessary to enter upon that wide field of investigation, into the origin and nature of corporations, and the extent of their powers, over which the learning and reasoning of the able counsel would lead me. It is sufficient to say that the rules governing the ancient municipal corporations of cities and towns, can shed but little light upon a question like the present. Such corporations had originally their rise in the principle of protection of life and property, from the barons and kings, and watch and ward was the duty of the burghers, and the bond of their safety. Particular franchises were successively won, from fear or favor. They were all inroads upon feudalism, and were all personal and peculiar privileges. *Rise and Progress of Cities; Smith's Wealth of Nations*, vol. 3, page 171, et seq. But when the increase of trade and commerce led to an appreciation of the value of a combination of capital and effort—"when men, having learned what wonders could be accomplished by union, began to think that union was competent for everything"—(Dr. Channing)—the formation of partnerships began. Joint stock associations followed. The principle was at first a mere extension of the essential elements of a partnership to a greater number of members, with some variations of government. But the perils of personal responsibility to the members, and the unwieldy machinery of such a body, led to application to the State to give them the protection of an incorporation. Through all the judgments of courts, based upon the doctrines of the common law—

through all the legislation of England, and of our own and other States, applicable to associations incorporated or otherwise, we find the great principles of a partnership recognized, changed indeed, modified, or impaired, but still pervading and discernible. Confining the inquiry to the most affluent fountain of our law—the law of England—we find that joint stock associations were known before the act of 1719, called the Bubble act; and they were based upon the principle of partnership, with an attempt to make shares transferable, and to limit the personal responsibility of members. That statute recognized the existence of such companies, and speaks of their mischievous consequences—that they have attempted to act as corporate bodies, pretending to make their shares in stock transferable, without legal authority by statute or charter from the crown. The act then provided that all such undertakings and attempts were void and illegal, and especially the acting, or presuming to act, as a corporate body, the raising, or pretending to raise, transferable stock or stocks, or to assign any share, without authority. By section 25th, the act was not to restrain the carrying on of any home or foreign trade in partnership, in such a manner as had been usually done, or might be done according to law. The transferability of shares, unrestricted and unregulated, was a blow at the accountability of every member of a partnership, by rendering the tracing of debtors difficult, and sometimes impossible to the creditor. Such a power was, therefore, reserved for the parliament or the crown. After the act, however, the effort was perpetually made to engraft this principle upon the schemes of joint stock associations, and no less strenuously was it attempted to limit the personal responsibility of the members to the amount subscribed, and exempt them from the demand of creditors. But the courts of justice invariably defeated these attempts, and fixed upon these joint stock companies every material attribute of a common law partnership, in the non-assignability of shares, and the absolute personal liability of members. The expression of Lord Eldon was but the echo of a multitude of decisions, that the wealthiest noblemen in the land might be involved to his last acre, and his last shilling, by a connection with such a company. In the year 1825, by the Act of 6 Geo. 4

cap. 91, the Bubble act was repealed, and, for the first time that I am aware of, it was provided "That in any other charter thereafter to be granted by his Majesty, it should be lawful to provide that the members of such corporation should be individually liable in their persons and property, for the debts, contracts and engagements of such corporation, to such extent as his majesty might deem fit and declare." It is sufficient to notice here the policy of our own State, exhibited in the manufacturing statute of March, 1811, and found now in the constitution itself, in regard to banking incorporations. The personal responsibility of the members was recognized, although limited to the amount of their respective shares of stock. Sess. 34, ch. 37, Constitution of 1846, art. 8, sec. 7. From the earliest judicial decision in our State to the present time, companies organized under this act, have been spoken of as mere partnerships, with some of the privileges and powers of corporations. *Slee vs. Bloom*, 19 Johnson, 473; *Bridges vs. Penniman*, Hopkins, 304.

This view has been followed in a multitude of subsequent decisions upon the same or similar statutes. It is sufficient to refer to *Hargon vs. M' Culloh*, 2 Denio, 119, which contains reference to many of them. In these statutes the right of transferring shares was given, and the mode left to the by-laws of the company; and in the general railroad act of our State (Laws of 1850, ch. 140), the points of assignability and personal liability are regulated. By the eighth section, the stock may be transferred in the manner prescribed by the by-laws of the company, but no shares are transferable until all the calls have been fully paid in. By the tenth section, each stockholder is made individually liable to the creditors to an amount equal to the amount unpaid on the stock held by him for all debts, until he shall have paid up the whole amount due by him to the company; and all are made jointly and severally liable for debts to servants and laborers for services performed to the corporation, but after an execution against the company has been returned unsatisfied. The want of the attribute of transferability in shares of stock was a consequence of the policy of the English law, founded upon the principle of partnership. The attempt of joint stock associations

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to render shares assignable, was denounced by the law, because it violated that principle; and the Legislature clothed companies with the power in opposition to the partnership law, and in doing so imposed certain restrictions and provisions, such as public registrations of the transfer, to obviate as far as possible the evils which dictated the common law rule. Details of the provisions upon this subject in some of the English acts may be found in the case of the *Cheltenham R. R. Comp. vs Daniels*, 2 R. R. and Canal Cas. 728, and in *Hebblewhite vs. McMorin*, ib. 51. Still through the whole stream of authority and principle in relation to illegal companies or companies privilege with an act of incorporation, the doctrine of partnership is visible. The former were unauthorized, and the latter statutory partnerships; but the basis of the association was the same. Thus in the case of *Ashby vs. Blackwell*, 2 Eden's Rep., 299, a case of important bearing upon most of the questions here, the plaintiff was possessed of £1,000 Melthian Bank stock, and employed John Price, a broker, to receive the dividends for her. Price forged a power of attorney from her, empowering him to sell the stock, which he did to the defendant Blackwell, and the stock was transferred to the latter on the books of the company. The bill was brought for a re-transfer of the stock or satisfaction from the trustees of the Melthian Bank. It was agreed that the plaintiffs were entitled to relief, and the question was whether Blackwell or the bank should bear the loss. A case was made of great carelessness on the part of the secretary, in receiving the forged power which was not authenticated as the by-laws of the company required. The lord keeper held that a trustee, whether a private person or body corporate, must see to the reality of the authority empowering them to dispose of the trust money; for if the transfer is made without the authority of the owner, the act is a nullity, and in consideration of law and equity, the rights remain as before. That as to Blackwell, he thought it was not incumbent upon him to inquire into the letter of attorney, because the letter of attorney in that and similar cases, was no part of the purchaser's title. The title was the admission into the company as a partner *pro tanto*, he accepting the stock on the condition of the partnership. The

letter of attorney is only the authority to the company to transfer. The company ought to answer for their servants' negligence. He decreed, that the stock be replaced in the name of the plaintiff, and that the bank pay Blackwell the amount he had paid upon the transfer, with interest. So, in *Bryant vs. the Warwick Canal Co.*, 23 Eng. L. and Eq. Rep. 91, Dec. 1853, a bill was filed by a shareholder on behalf of himself and all others, &c., to recover money paid into a company provisionally registered and then abandoned, although an official manager had been appointed. The bill was sustained upon the ground of an ordinary partnership right. So, in *Stevens vs. The South Devon Railroad Company*, 12 Eng. L. and Eq. Rep. 229, the principle of partnership was applied on a very important and complicated case, where a clause in a statute bearing upon the question was held directory, and the subject was considered one of internal management in which a majority of partners will decide. And so, in *Couro vs. The Fort Henry Iron Works*, 12 Barbour, 27, the Court say, "The tendency of modern decisions is to assimilate the action, duties and liabilities of corporations, to those of individuals and commercial partnerships." But the power to assign shares was a power to introduce new members into the partnership. The assignee was substituted for the assignor, in whole or in part, accordingly as the whole or a part of his shares was transferred. The holder of ten shares could introduce ten new partners in his place. True, they represented separately, what he represented in the aggregate; the representation collectively being of the same shares; but yet new partners were brought in by the will of one party alone. The general system adopted in unchartered companies, was to require a subscription to the deed of agreement or settlement. But while this was essential to constitute members among the associates, much less was sufficient to render a person responsible to creditors. And the very rule and distinction between the parties *inter se*, and to the world, was applied to these cases. See Wordsworth 182, *Maudsley vs. Le Blanc*, 2 Carr. & P. 409 n.; *Harvey vs. Kay*, 9 B. & C. 356, and *Ellis vs. Smæck*, 5 Bing. 521. Next, it cannot be contested that if a company was chartered with a definite limited capi-

tal, and nothing was declared respecting the amount of the shares, the company could adjust them at pleasure; and could give that power to the managers or directors. It is equally clear that the shareholders could authorize the directors to increase the number of such shares; and, if this could not be done by transcending the limit of the capital and adding to it, it must be understood as authorized to be done by diminishing the value of the shares. Cases can be imagined; cases, I understand, have occurred where such a method of raising money to meet the exigencies of a corporation, has been restored to. It will not do to say, that it cannot be imagined the stockholders intended to give a power, the effect of which would be to diminish their own profit. Such an answer might be made by a principal in every case of excess of authority. A joint stock company or a corporation then, if unfettered by express legislation, has an undoubted right to fix the number of shares into which the capital shall be divided, and when fixed, the associates may subsequently change it; and, if the power is reserved or implied in the articles of association, the directors or trustees may exercise such power. Thus, in the *Armstrong Railroad Company vs. Mitchell*, 6 Railway and Canal Cases, 236, the shares of a company were originally fixed at £25 a share, and, by a vote of the directors, were reduced to £20 a share. It was held that this was lawfully done. The statute under which it was organized, did not forbid it. A section of that act prevented any one from being entitled to vote except he possessed an interest in the capital to the amount of £25. It was also held that, under the charter the directors had the power. The *Lexington Railroad Company vs. Chambers*, 13 Metcalf, 110, and the *Kennebec Railroad Company vs. Jarvis*, 34 Maine Rep. 360, tend to support the same position. I repeat and condense these propositions, thus: The principles of a common law partnership govern joint stock associations, incorporated or unincorporated, except so far as modified by the statute, or fixed principles of law. The introduction of new members into a partnership, is, upon common law doctrine, only allowable upon a joint consent. This joint consent may be exercised and proven, either by an actual agreement in each particular instance, or by a delegation of the power

to assent, to a particular body, or to a particular person. If the delegation is made to a particular body, it may be accompanied, or not, with authority to that body to re-delegate it; and thus the question is first, whether the members entrusted the power directly to a particular officer; and next, if they did not, whether they entrusted it to a class of persons, with power of substitution; and lastly, have the latter made such substitution?

Now, if by a regular chain of devolved power, the authority to introduce new members into this partnership can be established, if by the act and agreement of the stockholders, the evidences of such membership are placed in the power of an officer to authenticate and issue, then a general power or agency has been delegated to him. And then his abuse or fraudulent exercise of that power will not prevent the company from being bound. This view meets the cogent argument of Mr. Wood, upon the nature of the agency in this case. What was the power delegated to Robert Schuyler, as transfer agent, and what was its extent? The first section of the charter passed 1st May, 1844, constituted Joseph E. Sheffield and others, naming them, "with such other persons as shall associate with them for that purpose, a body politic and corporate, by the name of the New York and New Haven Railroad Company." The second section provided that the capital stock should be two millions of dollars, with the privilege of increasing the same to three millions, and to be divided into shares of one hundred dollars each, which shall be deemed personal property, and be transferred in such manner, and at such places, as the by-laws of the company shall direct. By the third section, the parties who were authorized to receive subscriptions might make twenty thousand shares subscribed the capital stock of the company. But if the subscription exceeded thirty thousand, the same were to be reduced and apportioned in such manner as should be deemed most beneficial to the corporation. Under the fourth section, the immediate government and direction of the affairs of the company was vested in a board of nine directors to be chosen by the stockholders. Four of such directors formed a quorum for the transaction of business. By the seventh section, the directors were vested with the power to make by-laws and regu-



lations touching the disposition and management of the stock, property, and estate of the company, not contrary to the charter, or the laws of the State or of the United States; the transfer of shares; the duties and conduct of their officers and their servants; and all matters whatsoever, which may appertain to the concerns of such company." By the twentieth section, the act might be amended, altered or repealed at the pleasure of the General Assembly. In the exercise of the powers conferred by the charter a resolution was adopted by the stockholders to the following effect—(Book of Records, Nos. 20 and 21):—"Transfer and Certificates of Stock—The principal transfer office shall be in the city of New Haven, but transfer agencies may be established in the cities of New York and Boston, by resolution of the board of directors; and all transfers of stock at any office shall be made under, and in compliance with such rules and regulations, and by such instruments of assignment and transfer (which need not be under seal) as may from time to time be made, ordered and appointed by the Board of Directors. "Certificates of stock shall be in such form and issued under such rules and regulations as the Board of Directors may from time to time appoint and direct." The directors adopted the forms of transfers, certificates, and blank powers of transfer, and ordered their general use. On the 3d of February, 1847, the following resolution was adopted by the directors: "The receipts and certificates of stock on the books at New Haven, to be signed by J. E. Sheffield, as transfer agent; at Boston to be signed by J. E. Thayer & Brother, as transfer agents; at New York to be signed by Robert Schuyler, as transfer agent." Now, a certificate of stock is a written declaration that the party in whose favor it runs, is entitled to the shares expressed in it. It is a written admission that such person is a member of the company. The company is a partnership, except as expressly qualified. The certificate is, therefore, an admission that the person named is a partner. Did there then come down from the whole body of associates (the stockholders in this company), a power to Robert Schuyler to declare that the person mentioned in such certificate was a member? It seems to me that the affirmative is made out by the series of acts and resolutions I



have stated. I do not see what link in this chain can be broken. Grant this, and the first part of Mr. Wood's powerful argument is overthrown. That was in substance, this: You cannot, by any rational deduction, imply a power in an agent to do that which it was totally out of the power of the principal to perform. Yet more strongly—you cannot imply such power, when the principal was prohibited by the express law of the State from doing the act, and it was a violation of public policy and public law to do it.

The first proposition of this argument is met by what is above stated. Irrespective of statutory prohibition, there was a power in the company to admit new members, and that power had been delegated to Robert Schuyler. And then we are led to the next position of the learned counsel. Does the charter or statute law prohibit the act? It is perfectly clear that when the Legislature has prescribed a limit to the capital of a corporation, a direct increase of the amount would be a violation of the compact, and a ground of forfeiture. In granting corporate privileges, the regulation of the capital is governed by two considerations—the necessity of raising an amount sufficient to accomplish the public object, and the forbidding a larger accumulation of money or property in the hands of one body than is essential for that purpose. For a company then to transcend the fixed amount is to usurp a right to increase the great element of corporate power, contrary to a fundamental policy of the State. But it is not seen how this line of reasoning applies with the like or with any force to the increase by a company of the number of its shares, in any manner which leaves the capital precisely as it was before. If as before observed, the charter of a company had fixed a capital, but was silent as to the number or par value of shares, the company (or its agents if entrusted with the power) might adjust and readjust such number or value. If, again, when the charter, as in this case, directs that there shall be a defined number of shares of \$100 each, the associates had agreed to increase the shares by reducing the par value of what they held by a given per centage, would that be a violation of the charter such as to work a forfeiture, or would it be a matter only affecting the individual members as to their pecuniary interests in the stock?

We find that under the present charter, there might have been thirty thousand members of the company. It is not easy to see what great rule of public policy is invaded if this number was voluntarily increased to forty thousand, the limited capital remaining the same. The effect in the case suggested would be that each stockholder would reduce his share, for which he has paid \$100, to \$75, and receive his part of future profits upon the latter sum. But it is here necessary to examine with care a decision of the Supreme Court of Massachusetts, pronounced by its late distinguished chief justice, bearing upon this point. The case is that of the *Salem Mill Dam vs. Ropes*, 6 Pickering 32, reaffirmed in 9 Pickering 187, and confirmed in 10 Pickering 147. It must be noticed that this case arose upon an action against a subscriber for payment of a call, which was resisted on the ground that his subscription was conditional, and that such condition had not been fulfilled. The charter was that the capital should be \$500,000, and the shares 5,000, of \$100 each. The directors had attempted to go on with the business of the company when only 2,687 shares had been subscribed. The Court held the defendant not responsible for the call, and the line of reasoning was in substance this: A subscriber has a right to the benefit of the expectation and possibility that the whole of the capital allowed by the charter may not be necessary for the object contemplated. If, then, when the capital is \$500,000, and the shares 5,000 and each share of course \$100, should it occur that \$250,000 will suffice for the object, a subscriber for one hundred shares will only be called on to pay \$5,000, or \$50 a share. But if the shares are reduced in number to 2,500, each subscriber for 100 shares must pay \$10,000, or his utmost limit. This would be against the condition of his subscription. Again, every subscriber has a right to calculate upon a fund computed to be commensurate with the object, and that each of the 5,000 shares should be liable to a tax of \$100, to produce that effect. A power to reduce the shares to 1,000, without a power of taxing them beyond the \$100, would be a power to expend \$100,000, which might be totally insufficient, and might be wholly wasted and lost.

Now, it appears to me that it is inaccurate to say that these

cases prove that a reduction of the number of shares expressed in a charter, is a violation of that charter. It is correct to say that they prove that it is a violation or non-fulfilment of a condition in the contract, between a subscriber and the company, the terms of which contracts are found in the charter. Then the condition of the contract may be waived, modified, or insisted upon, at the will of the subscriber, with the assent of the company. And hence we are, in each particular case, to ascertain whether such was a condition of the contract, and whether, if it was, it has been waived. In this point of view the question was regarded by the Court, in the case of *Lexington and W. Cambridge Co. vs. Chambers*, 13 Metcalf, 311, and in the *Kennebec Railroad Co. vs. Jarvis*, 34 Maine Rep. 360. In the last case the Court says, that the contract there could not have had reference to any certain number of shares or certain amount of capital, as fixed by the charter, and there is no language used in the contract prescribing the number of shares, or the amount of the capital. It may be admitted that an increase of the number of shares, by a reduction of the value of those already issued, by affecting the amount of the profits of the holders as well as the actual sum represented, stands upon a similar footing as a reduction of shares which tends to increase his liability or endanger his advance. But the question still, in each instance, is one of contract and authorization. Upon this question of forfeiture of the charter, I have examined the following cases, and the result, in my judgment, is, that it is at least very doubtful whether the tribunals of Connecticut, would determine this charter to be forfeited by the adoption of this stock as part of the stock of the company, by reducing the value of the genuine shares in the manner pointed out. *Kellogg vs. The Union Co.*, 12 Conn. Rep. 7; *The State vs. The Essex Bank*, 8 Vermont Rep. 489; *Planters' Bank vs. The Bank of Alexandria*, 10 Gill & John. 346; *Attorney General vs. The Petersburg Railroad Co.*, 6 Iredell, 456; *The People vs. Oakland County Bank*, 1 Douglass, 282; *State of Mississippi vs. The Commercial Bank of Manchester*, 6 Smedes & Marshall, 233. See also the cases in this State, cited in Angell & Ames, sec. 776, note. There remains one point on this branch of the

case, to which the observations of counsel have been to some extent directed, and that is as to the effect of the possession of a certificate merely, with or without a power to transfer annexed to or accompanying it.

It is conceded, as a rule very general in its extent, that for the purpose of voting, or exercising any control in the management of the affairs of such companies, a registration on the books is necessary. Regulations of this nature are sometimes contained in the charter—sometimes prescribed in by-laws, and in our State directed by express statute as to various incorporations. It is sufficient here to refer to the general statute as to moneyed corporations,—(2 R. S., 596, § 36, 37 and 38,) and the general Railroad act adopting them, (Laws of 1850, ch. 140, § 5) and to the case of *Rosevelt vs. Brown*—1 Kernan's Court of Appeals, 152. Again, as a general rule, it may be stated that such registration is essential to release an apparent owner from responsibility to the calls or debts of the company. *Sayles vs. Blanc* 14 Queen's B. Rep. 205; *Wynne vs. Price* 3 De Gex & Smales, 310; *Adderly vs. Storms*, 6 Hill, 626; *Worrall vs. Judson*, 5 Barbour's Rep. 210. A certificate of the ownership of shares issued to a registered party, is, in truth, an evidence and declaration of a right of property to the shares expressed in it. The power to transfer, which may be annexed to it is immaterial as to the party's own title. It serves the office of enabling him to invest another party with his own absolute right of property and to obtain his recognition by the company as such. It serves the purpose of enabling such person to transfer the same right and interest to another, and so successively. But this can be accomplished by any instrument of assignment, and, indeed, by a mere endorsement on the certificate—*Commercial Bank of Buffalo vs. Kartright*, 22 Wendell, 362—that the certificate is the substantial ground and evidence of title and interest; and the power to transfer but an adjunct will, I think, appear from the following decisions.

In *Doloret vs. Rothschild*, 1 Sim. & St. 590, a bill was sustained for the delivery of certificates of stock in a loan, for which the plaintiff had subscribed. In *ex parte Barriere*, 11 Eng. L. & Eq. R. 128, a party who took a certificate of stock without complying

with a by-law requiring registration, was held responsible. In *Newry R. R. Co. vs. Edwards*, 2 Exch. Rep. 118, a person under similar circumstances was considered a shareholder from mere possession of the scrip. In *Cheltenham R. W. Co. vs. Daniel*, 2 Railway Cases 728, and *The same vs. Medina*, ibid 735 the purchaser of scrip certificates who sought to get himself registered, but accidentally failed, was held to be a member. In *Bagshaw vs. The Eastern R. W. Co.*, 6 Railw. and Canal Cases, 152, 166, Chancellor Wigram stated it as an indisputable proposition that the holders of scrip certificates in the stock of a company could sustain a bill to prevent the misapplication of the capital. There was an inchoate right in such persons to become general shareholders. In — vs. *The Marblehead Co.* 10 Mass. Rep. 476, the delivery of a certificate with an endorsement upon it for valuable consideration, was held sufficient, and entitled the holder to the interest and title when the calls were paid in full. In *Ashley vs. Blackwell*, 2 Eden Rep. 300, where it was held that a company was responsible to a party whose stock had been transferred under a forged power, the lord keeper said that the letter of attorney was no part of the title, but only an authority to transfer. The title was an admission into the company as a partner *pro tanto*, he accepting the stock on the conditions of the partnership. The letter of the attorney is only the authority to the company to transfer. And in *Fatman vs. Loback*, 1 Duer Rep. 354, this Court held that the holder of a certificate, with a power annexed in blank, could retain the securities for moneys advanced to the first pledgee of the stock, although the owner had paid such pledgee in full. The possession of the documents gave the pledgee an equitable title, which, by filling up the power, he could convert into a legal one. Indeed, it seems difficult to avoid the conclusion that, as between immediate parties, a mere delivery of a certificate as security upon obtaining a loan of money, would be an equitable pledge of the stock, equivalent to an equitable mortgage by a deposit of a loan. See *Russel vs. Russel*, 1 Br. C. C. 209; *Moore vs. Choat*, 8 Sim. 508; *Welsh vs. Usher*, 2 Hill Ch. Ca. 170.

It follows that the holders of certificates, even as I think, without powers of transfer, are equitably shareholders or members of this com-

pany, with a right to authenticate their title by procuring a transfer on the books. If they do not possess a power of transfer, it will only be a difficulty of evidence to make out their right. The result then is that the plaintiffs are entitled, under the certificate and power taken by them from Mr. Stevens, the President of the company, to be admitted as shareholders in the capital of this company in common with all other shareholders whose rights are admitted or shall be admitted, and that their right is in proportion to such whole number of holders allotted upon a capital of three million of dollars.

It will be seen that this view of the rights of the parties excludes any right to sue for damages or to sustain any action except upon the ground of common ownership, unless indeed the company refuse admission. Whether in such a case a suit for damages, or a mandamus, is proper, I do not consider. Since this opinion was written I have been referred to the case of *exparte Hassinger*, 2 Ashmead, 287. That case is strikingly in point, and the line of reasoning, in several particulars, similar to that I have pursued.

6.—The last subject of consideration raised by the counsel is, whether these plaintiffs are not so far chargeable with notice of the character of this stock, as that upon that ground alone they must fail in this action. It appears that Mr. Ketchum, one of the plaintiffs, was a director and officer of the company at the time of the fraudulent entry of the stock, and since; and it is insisted that he was bound to know the operations of the company, the position of the books, and that his knowledge is that of the firm. It is, as I understand, admitted that he was a stockholder. The general law which I have treated as applicable to this case, gives every partner an equal right to the control and inspection of the books, and charges every partner with a knowledge of their contents. Besides, this right belongs to every corporator by settled rules of law. *Rex vs. Shelly*, 3 T. R. 142; *Rex vs. Travanion*, 2 Chitty's R. 366 n; *Rex vs. Tower*, 4 M. & S. 162. Again by an act passed April 11, 1842. Sess. laws, 1842, Ch. 165, the transfer agent in this State, of any moneyed or other corporation existing beyond the jurisdiction of this state, shall, at all reasonable times during the hours of transacting business, exhibit to any stockholder of such foreign cor-

poration, when requested by him, the transfer books of such foreign corporation, and also a list of the stockholders thereof if in their power so to do. The second section imposes a penalty of \$250 for a refusal to make such exhibition. It will not escape attention, that the fraud in the present case was of the most apparent and glaring character. On the face of the stock ledger, stood two entries of the enormous extent of 5,000 shares each; transferring those amounts from the transfer agent substantially to himself. And on the page of the ledger referred to in this entry, in the bald debit of 10,000 shares in two items, to the transfer agent. There never was a case of more flagrant neglect of all the accessible means of information than on the part of a director taking stock directly from R. & G. L. Schuyler. When such a case arises, it will be difficult to avoid the application of the rule which places a party who has knowledge of a fraud, or the path to knowledge of a fraud, plainly before him, in the same position as the criminal himself. In the language of a judge, who, at least, never left a decision or a proposition obscure, "It will be no public detriment if my decree tends to make the directors of public companies attend to the business of those companies, and teaches them not to leave the important transactions of millions to undirected clerks and book-keepers." (Lord Noythington, 2 Eden, 303.) If the consequences of the neglect fall upon the director, instead of the company, in the loss of his own demand, the rule will be yet more equitable in its application than it was in the case before the lord keeper.

I do not propose to inquire under what if any circumstances, a stockholder of the company, not a director, may be subject to a similar imputation of constructive notice. The field is wide and the cases numerous, upon the question of what shall be sufficient to affect the conscience of a purchaser with the consequences of the fraud of his seller. In the present case it may be doubtful whether the firm is bound by the constructive knowledge of a member chargeable upon him as director; but in the next place, the plaintiffs are entitled to shelter themselves under the want of notice, implied or actual in the bank. It does not appear that the bank, in its corporate capacity, or that any of its officers on its behalf, held stock, so as to



entitle it to examine the books. I have thus endeavored to discharge my duty in a case more serious and important than any other which it has been my lot to determine. No one can be more conscious than myself of my own inability to meet its difficulties and dissipate its darkness. No one could bestow more anxious thought and solicitude to decide it righteously. I humbly trust that the hope which I have imbibed from the source of all truth and peace may be realized, and that this fierce struggle may end like the contest for the wells of springing water between the servants of Isaac and the herdmen of Gerar, when the stream of the fountain of Rehoboth and the fruitfulness of the land followed and rewarded the submission of the patriarch.

The complaint must be dismissed with costs.

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*In the Supreme Court of Pennsylvania.*

CADWALADER vs. MONTGOMERY.

*Moroney's Appeal.*

A mortgage in the common form was given to secure moneys covenanted to be advanced as buildings upon the premises progressed, *held*, per BLACK, C. J., LEWIS and LOWRY, JJ.; WOODWARD & KNOX, JJ. *dissentientibus*—

1. That the instrument by which the terms of the loan was regulated, need not be recorded.
2. That the mortgage had priority of lien over the claims of mechanics, from the date of its record, and not from the dates of its actual advance.
3. The agreement that the money should be appropriated towards paying for materials and workmanship, neither postponed the mortgage nor required the mortgagee to see to the application of the money.

From the District Court of Philadelphia.

These were appeals from the distribution of a Sheriff's Sale.

On the 7th of August, 1849, Cadwalader conveyed to Montgomery by several deeds sixteen lots, each fronting on Wood and Carlton streets, in the City of Philadelphia, reserving ground rents, which were the consideration for the grants.

On the same day, Montgomery mortgaged the premises to Cad-



walader by several deeds, to secure bonds conditioned for the payment of the aggregate sum of \$12,000.

These bonds and mortgages were in the common form, and payable in one year, and they were recorded on the same day. Within one week Montgomery commenced the erection of houses on all of these lots, and the premises having been sold under Cadwalader's mortgages, his right to be paid out of the fund was disputed by mechanics who had furnished materials, and whose liens related to the commencement of the buildings.

It was proved that no money was actually loaned at the time the mortgages were given, but the consideration was an agreement of the same date between Cadwalader and Montgomery, under seal, whereby Montgomery agreed to erect thirty-two houses on the lots, and Cadwalader agreed to advance to Montgomery, "to be appropriated towards paying for materials and workmanship for the said buildings, \$750 on the houses to be built on each lot." These payments were to be made by instalments of \$100 at different stages of the progress of the work, and \$800 when the houses were finished and release of liens signed. By this instrument it was declared that these moneys were to be secured by the bonds and mortgages above mentioned.

This instrument was neither recorded nor in any way referred to in the mortgage deeds or bonds.

The first payment by Cadwalader was on the 18th of August, after the work was commenced and the liens of the mechanics had attached.

The last instalment of the \$12,000 was paid November 5th.

These payments were made without particular reference to the progress of the work, in part to enable Montgomery to purchase materials for cash, and a large part of it directly to material men on Montgomery's orders. Montgomery was himself the builder, and did the carpenter work.

The balance due from the Sheriff's sale was less than \$10,000 after deducting expenses, and the question was whether the mortgages had priority from their date of record over mechanics' liens and judgment creditors of Montgomery, whose liens attached before actual payment of the money.

Another question was also discussed in the Court below, whether it was competent for the mortgagee to object to the validity of mechanics' liens, after judgment had been recovered upon them. The judgments having been entered, after all the advances had been made on the mortgages, but the claims filed were relied on, to show liens existing prior to the advances.

These liens were, however, decided in *Taylor vs. Montgomery*, in the Supreme Court, to be well filed.

A demand for an issue was made, and exceptions filed to the Auditor's report, awarding the proceeds of sale to the mortgagee.

April 24.—SHARSWOOD, P. J. delivered the opinion of the District Court.

As the question presented is one of mere law, we see no reason for sending the case to a jury, if the law be with the plaintiff. Unless the mortgage be totally void as against lien creditors, assuming that no advance had actually been made upon it before the building was commenced, the plaintiff has a right to proceed, and we have no right to delay him, more especially as the terre-tenant not being a party to the scire-facias on the mortgage, will not be precluded from taking defence in an action of ejectment by the sheriff's vendee. That a mortgage to secure future advances is good between the parties, nobody disputes; and it is equally well settled that such a mortgage is not available against subsequent incumbrances, except to the extent of what may have been actually advanced at the date of the respective subsequent incumbrances. The reason is that the mortgagee, before making each advance, is affected by the constructive notice of such subsequent incumbrances afforded by the record.

If he made the advance after such notice, it was at his peril. But how, when the mortgagee is bound by covenant to make certain specified advances?

Notice of subsequent incumbrances will afford no defence to an action on the covenant. He will be bound notwithstanding such incumbrances. Cannot, then, a man who has bound himself by a legal obligation to pay a certain sum of money for another at a day certain, secure himself by a mortgage for that sum, which will be available, from the date of its recording, against future liens?

It certainly never has as yet been so decided. So far from it, the reasoning of the Supreme Court, in *Ter Hoven vs. Kerns*, 2 Barr, 96, is the other way—though it was not, indeed, the point decided—which justified the reporter in stating it with a quære in the syllabus. The point in that case was, whether the mortgagee must have actual notice, and it was held that record notice of the junior liens was enough. Judge Kennedy says, that it is true generally, and perhaps universally, that the prior incumbrancer is not bound to look to the entry of subsequent incumbrances, when the incumbrance is given to secure the payment of a debt in being, the amount of which is fixed and mentioned, or as an indemnity against future liabilities, which may or shall arise from having become bail or surety for the incumbrancer; and it will be found to have been the ruling, as well as the concluding reason of the judgment, that he was under no obligation to make future advances, and that therefore there was no good reason why he should be regarded otherwise in making future advances, than if he were making advances to the parties for the first time.

On principle, if there is an absolute covenant to pay, it is *debitum in presenti solvendum in futuro*. Why cannot the debtor accept such an obligation as actual payment—actual fraud on creditors being out of the question, and legal fraud being put out of the question, by the stipulation or understanding that the mortgage can only be enforced to realize the sums actually advanced. If I give any bond to a friend, payable in one year, upon which he can realize the money in the market, surely I can take a mortgage from him to secure the advance, as much as if I had borrowed the money myself upon such security, and paid him the money. And how does such case differ from that now before the Court? Certainly in form only, if there is any difference, not in the substance of the thing.

But an attempt has been made to apply the principle of *Friedley vs. Hamilton*, 17 S. & R. 27, that the registry of an absolute deed, with an unrecorded defeasance, verbal or written, is not a sufficient recording to make it available as a mortgage against future liens. That case did not give satisfaction to the profession, and certainly

was in conflict with many prior cases. It has been acquiesced in, however, and is now beyond question the settled law of the land. Here, however, the security was in form of a mortgage. It was conditioned simply to pay the sum agreed to be advanced. It is supposed that, not having referred expressly to the covenant, or recited the terms of that covenant, the record does not truly express the nature of the transaction; it is likened to a mortgage for a large sum, with an unrecorded defeasance that it shall be void on the payment of a less sum. *Garber vs. Henry*, 6 Watts, 57, is relied on in support of this view. It is enough to say, that in that case the mortgage was sustained. There the condition was not to pay any particular sum of money, but to pay such sums as the mortgagor might, from time to time, owe to the mortgagee, according to an agreement entered into between the parties, the agreement not being recorded nor its date given. All that was laid down was, that the agreement as contained in the record of the lien, should give all the requisite information of the extent and certainty of the contract, so that a junior creditor might, by inspection of the record, and by common prudence and ordinary diligence, ascertain the extent of the incumbrance. The case before us is a much stronger and better one than that. Here the junior creditor is informed of the precise sum constituting the true extent of the lien, without being driven, as in *Garber vs. Henry*, to an inquiry *in pais* of the parties to the mortgage.

If the position already taken be a sound one, that the absolute covenant to advance at a certain time be a present debt, then the condition was truly and perfectly expressed. It cannot be that the nature of the transaction, out of which the mortgage grows, or the character of the value advanced, must be set forth and truly described. Few mortgages would stand so rigid a test. The consideration of a mortgage for the purchase-money of land or goods, is really not so much money paid, but land or goods agreed to be worth so much money. If I give my note payable at a future time, and it is accepted as money, that certainly need not be stated in the record. A failure of the consideration of the mortgage is an equitable defence in all these cases. If the title to the land or

goods fail; if I refuse to pay the note which I gave, and secured myself by the mortgage; if, in the case before us, the covenantor had broken his covenant to make the advances, it would doubtless be a good defence. These cases all stand on the same footing, and the same reason exists in all of them, for spreading a full statement on the face of the record. Such would be the sweeping character of the principle we are called upon to adopt and apply to this case. It would uproot many honest securities, and render uncertain mortgages of daily necessity and occurrence. For these reasons we discharge this rule.

•September 11.—SHARSWOOD, P. J. Upon a rule to set aside the *levari facias* in this case, and let a terre-tenant into defence, the opinion of the Court was fully expressed upon the validity of this mortgage, and upon the sufficiency of the record of it, to make it available against lien creditors and others. As other parties now appear, who did not take part then, we have heard these questions re-argued, and with ability; but it has not resulted in producing any change in our opinion.

As this disposes of the whole case, it is unnecessary to examine the other questions discussed, as to the validity of the liens, and the demand of an issue thereon. As, however, one point, the right of the Auditor, when there has been a judgment, on a *sci. fa.* on a mechanic's lien, to inquire and decide as to the regularity and validity of the lien, when the question arises between parties, other than those who were parties, and privies to the judgment, is one of considerable frequency and importance in practice, we think it proper to add that we are against the exceptants on that point.

A judgment may be attacked collaterally before an Auditor, for fraud or collusion; and if an issue is demanded, he may decide that it is fraudulent, as to the party impeaching, and exclude it from the distribution or postpone it.

It is not competent, however, for any third person to attack a judgment on the ground of error or irregularity, which can only be taken advantage of by a party or privy on writ of error.

When, however, a creditor has a lien prior to the date of the judgment, and it is claimed that the judgment takes priority of

him, because rendered upon the debt, which was a lien prior to the judgment, then it is competent to the creditor holding a lien prior to the date of the judgment, to discuss the validity of the prior lien.

A simple case will illustrate the position. A judgment has lost its lien by the lapse of five years, then another lien is entered, and afterwards upon a *sci. fa.* to revive the first judgment, a judgment of revival is entered, the intervening judgment creditor, purchaser, or mortgagee, may undoubtedly show that the lien of the revived judgment was gone, notwithstanding the judgment of revivor.

It does not appear in Lauman's Appeal, 8 Barr, 473, whether judgments upon the liens were obtained prior or subsequent to the entry of the judgments, which are called in the report, *subsequent*. If they were subsequent, the decision in that case is entirely consistent with the opinion now expressed. We cannot think that the Supreme Court meant to decide that if a mechanic's claim was not a valid lien, from a want of compliance with the requisites of the Act of Assembly—if it was uncertain as to the description—failed in specifying the date, character and amount of the claim—if it had not been filed in time—that these defects would all be waived, as against an intervening creditor, mortgagee, or purchaser, by a judgment of which he had no notice, and to which he was no party.

There may be reason for holding, and it is all we can suppose that the Supreme Court meant to decide, that a man who lends or pays his money after the judgment, takes subject to the lien of the judgment, *qua* judgment, which may have, with great appearance of justice, the effect given to it of a general judgment, though its lien may, from the nature of its proceedings, be merely specific. Thus, a judgment on a *sci. fa.* on an unrecorded mortgage, may be a lien from its date, *qua* judgment. But, surely, a party who had advanced his money before upon the faith that there was no record, or that the record was insufficient and void, is not concluded by the subsequent judgment on the *sci. fa.* to which he was neither party nor privy. It would be monstrous so to hold. A judgment is evident to all the world that there is such a judgment, with all its legal effect as a judgment—a debt of record with lien. No mere

stranger can object that it is erroneous, but beyond its legal effect as a judgment, as evidence that the debt recovered was due ten days, or ten years before, that the debt had a particular quality or anything else, though, as between the parties, entering into the very vitality of the judgment, it is not even evidence as against strangers, much less conclusive of their rights.

Exceptions dismissed.

The case was argued in the Supreme Court, by *E. Ingersoll, Lawrence, Porter and McElroy*, for appellants, and *McMurtrie and Cadwalader*, for appellees.

It was afterwards re-argued on the question, whether the mortgages were well recorded, the collateral agreement not having been recorded.

*For appellants.*—The record should have contained a notice of the true consideration and real state of the title, 4 Kent, 175. *Pettibone vs. Griswold*, 4 Conn. 158; *Stoughton vs. Pasco*, 5 ib. 446; *Freedly vs. Hamilton*, 17 S. & R. 72; *Jacques vs. Weeks*, 7 Watts, 268. Where the consideration is to secure future advances this fact must appear, and creditors be able to learn the amount, *Lyle vs. Ducomb*, 5 Bin. 585; *Stewart vs. Stocker*, 1 W. 140; *Irvin vs. Tabb*, 17 S. & R. 420, 421, 423; *Garber vs. Henry*, 6 W. 59.

2d. In the case of future advances, liens attaching before advance made, have priority, (*Ter-Hoven vs. Kerns*, 2 Barr, 96,) and this is such a case, for until advances made there was no debt and no consideration, and until then no lien.

3d. It is the agreement that these mortgages shall be postponed to mechanics,—there is a stipulation that the money is to be paid to them and releases obtained. If it were not so, then the contract is a fraud on the mechanics' lien law, for the existence of such liens were contemplated, and intended to be avoided.

*For appellees.*—That such a security can be taken and is valid from its inception, is shown by *Shirras vs. Craig*, 7 Cran. 34; *Lyle vs. Ducomb*, 5 Bin. 585; *Parmentier vs. Gillespie*, 9 Barr, 86, all of which were securities against future contingent liabilities.



2. The details need not appear on the record. The statute requires but the recording of the mortgage, and the nature of the liability or debt is immaterial. The record must speak the truth, and must show that it is a mortgage and the extent of the lien; nothing more. *Lyle vs. Ducomb*; *Hamilton vs. Freedly*; *Cover vs. Black*, 1 Barr, 493; *Gordon vs. Preston*, 1 W. 385; *Bank vs. Bank*, 7 W. & S. 395; *Jacques vs. Weeks*. This was not such a case of future advances, as is referred to in the decisions,—those were optional, here they were on a condition beyond Cadwalader's control. The distinction is taken in 2 Barr, 96, 99. An undertaking to pay at a future time, is equivalent to actual payment as a consideration, and this contract and its consequences are thus secured. This is fully decided in *Miller vs. Howry*, 3 Penna. 374; *Ledyard vs. Butler*, 9 Paig. 132, 136, 137; *Crane vs. Deming*, 7 Conn. 388. *Hubbard vs. Savage*, 8 ib. 215. The record of the mortgage (Mortg. Bk. J. C. p. 74) shows that the agreement referred to in *Lyle vs. Ducomb* was not recorded, though endorsed on the mortgage. *Stewart vs. Stocker*, 1 W. 140; *Riley vs. Ellmaker*, 6 Wh. 545; *Edwards vs. Bank*, 1 G. & J. 362.

3d. The stipulation for the application of the fund, was for the better security of Cadwalader. *Edwards vs. The Bank*. But if any right was thus given to the mechanics, this payment to Montgomery was sufficient. *Balfour vs. Willard*, 16 Ves. 151, 156; 2 Sug. 35 § 9. And the mechanics have no right but under the statute, which expressly subjects them to liens then subsisting, and implies that they examine the record.

The opinion of the Supreme Court was delivered by.

LOWRIE, J.—Montgomery gave to Cadwalader several mortgages conditioned 'altogether for the payment of \$12,000, and we may treat them all as one. Shortly afterwards, Montgomery commenced the erection of several houses on the mortgaged property, and liens for the work and materials have been filed and judgments obtained on them, which claim precedence of the mortgage. It appears that no money had been actually lent to Montgomery on the mortgage until after the buildings were commenced, but that



its true consideration was a covenant not recorded, by which Cadwalader agreed to advance \$12,000, in defined instalments, in order to enable Montgomery to make the improvements, and that it was actually advanced in accordance with the covenant.

Does the omission to record the covenant have the effect of postponing the mortgage to the liens for building? Why should it? Is it because the consideration of the debt is not set out in the bonds and mortgage? The expression of a consideration as such is never necessary to the validity of sealed instruments. But the debt expressed in the bonds is the consideration and subject matter of the mortgage, and as subject matter it was necessary to set it out, and it is done truly, and the parties have by their contract created a lien for that very debt.

It is said, however, that it was not properly a debt then owed, because the covenant which was the consideration of it, had not then been performed. But this conclusion is very plainly inconsequential; for a promise to be performed in future, is one of the most common of all kinds of consideration for a present debt, the strict legal character of the transaction depends upon the form in which the parties have invested it, the bonds for the covenant, and the covenant for the bonds, being each independent debts. How are they connected? Only by equity. If Cadwalader breaks his covenant, Montgomery may obtain relief in equity as against the bonds and mortgage. But he might not need this, for the remedy on the covenant might be complete.

If equity interferes to change the form given to the matter by parties, it does so for the purposes of equity, not inequity—to establish the claim according to its spirit, not to defeat it—to save the mortgagor and his creditors from the forfeiture and from the penalty, and compel the creditor to accept the real debt and interest—to save him and them from any fraud or mistake, and not to let them gain an advantage by it. The relevancy of Cadwalader's covenant is therefore only contingent. It might be important as a ground of equitable relief; but it has no strictly legal connection with the mortgage. It is entirely irrelevant, except on the allegation that the consideration of the bonds has failed. Here it did not

fail, and therefore the legal and the equitable aspects of the transaction coincide.

And such a covenant or collateral agreement as we have here, has never been required to be recorded. The Acts of Assembly simply require the recording of the mortgage. True, it was decided in *Hamilton vs. Freedly*, 17 S. & R. 70, that when the mortgage consists of a conveyance with a separate defeasance, the recording of the conveyance alone is not a compliance with the law, because by such a record it does not appear as a mortgage transaction. But the sharpness of this principle has been somewhat moderated in *Jacques vs. Weeks*, 7 Watts, 261, by holding such a record sufficient if the mortgagee is in possession, because this is notice enough to put people upon inquiry, when they may ascertain the true character of the claim. Yet such implied notice contains in it no indication of the terms of the mortgage. Of the same character is *M. & M. Bank vs. The Bank of Pennsylvania*, 7 W. & S. 335, where actual notice of the defeasance supplied the neglect of recording it. Of course these cases refer to the effect of such matters upon subsequent liens and purchases; for the mortgagor could not raise the question.

So, in *Garber vs. Henry*, 6 Watts, 57, the conveyance contained a condition that it was to be void on the payment of certain sums of money said to be mentioned in another agreement, but not set out in the conveyance. It was entirely imperfect as a mortgage, and in strict law it was absolute, for the condition was void for uncertainty, taking it by itself, and as it was recorded. Yet this reference to another instrument was regarded as sufficient in equity to make that instrument a part of the conveyance, and thus convert it into a mortgage; and therefore in equity it was a recorded mortgage, containing sufficient notice of a defeasance which was substantially unrecorded. And such is the case of *Crane vs. Deming*, 7 Conn. 388, and there it is said to be sufficient that the defeasible character of the instrument appear, with such information in relation to it as will direct inquiry, and guide investigation, and that it is no objection that the inquiries may be difficult to make, because of the distance of the mortgagor's residence, 7 Conn. 396, 4 Id. 162, 5 Id. 449, 6 Watts, 59.

The case of *Lyle vs. Ducomb*, 5 Binn. 585, is very nearly like the present one. It was, as recorded, a mortgage for a sum absolute; but there was an agreement showing that it was for endorsements made and to be made, which agreement has been ascertained, to have been unrecorded, though this is not noted in the report of the case. It differs in this, that the endorsements were made, but not paid before the contesting lien was created. It was held, however, that the fact that the debt was stated in the mortgage as absolute when it was not so, and that the collateral and qualifying agreement was not set out nor referred to, did not invalidate the lien of mortgage as to subsequent lien creditors; and this is the point of its relevancy here. And for this point, the case of *Lyle vs. Ducomb*, has become an authority all through the United States, and has never been doubted. The principle of it is affirmed everywhere, 7 Cranch, 34, 50; 9 Paige, 132; 8 Conn. 219; Paine's C. C. R. 525; 4 Johns. Ch. 64; 1 Pet. 448; 7 Vin. Ab. 52; pl. 3; 1 Watts, 140. It is involved in *Gordon vs. Preston*, 1 Watts, 385, where it is decided that the fact that the mortgage is for a greater sum, than is due, does not avoid it as to the other lien holders, unless there be fraud; and in all the numerous cases where mortgages to secure future advances are held to be good, for in these cases the information is necessarily indefinite and demands investigation.

It has been supposed that there is a public policy that demands, that the record of the mortgage shall be more specific than it is in this case, but the supposition is plainly disproved by the cases above referred to, and their evidence is corroborated by the practice in relation to judgments. Nothing is more common than to enter judgment for the penalty of bonds, without any notice being taken of the real debt in any part of the record. Unless where oyer is craved, the condition is no part of the record, where the old common law of a record is still adhered to.

In *Parmentier vs. Gillespie*, 9 Penn. State R. 86, this point was raised, and it was decided that a judgment confessed for a certain amount as due, was good, though it was really given for advances made and to be made, and this as against liens entered before the

advances were made, if they were made in pursuance of a previous agreement; and the same principle is involved in *Ter-Hoven* vs. *Kerns*, 2 P. St. R. 96, and in many other cases. 1 Watts, 140, 374; 3 Pa. R. 374; 16 Johns. 165; 5 Johns. Ch. 320. It has never been supposed that such a judgment was void because of the neglect to change the common law form for a record, in order to set out the equitable conditions on which it was given, and there would not be much equity in now declaring that the common law and common customs, and common forms of conveyancing are all wrong. In New York it has been considered important to have the true state of such judgments specified, and an Act of the Legislature has been passed requiring it.

Besides this, an assignment to secure debts is not void because of its being absolute on its face, 2 Johns. Ch. 283. A pawn or pledge of any kind is not void because its conditions do not appear. In debt on bond to secure the performance of conditions, only the broken conditions appear on the record, yet the judgment for the penalty is a lien to secure the performance of others yet remaining unbroken.

And why should it not be so? No man deals in real estate on faith in the liens as recorded, for subsequent facts are continually changing their true character by payment and otherwise. To direct inquiry and guide investigation is therefore a main purpose of the record.

But it is argued that since Cadwalader had not advanced the money when the buildings were commenced, it was his duty to see that it was properly appropriated to pay the builders, and thus discharge their liens.

The least reflection will show, however, that this is only another mode of stating the proposition which we have already disproved: for his lien is postponed if its priority is conditioned upon his paying theirs, but we may notice it farther.

We have shown that the record of the mortgage is notice of the lien which Cadwalader had obtained, and it is therefore very plain that the builders undertook the work subject to Cadwalader's rights. In other words, they have no claims upon him, either to

yield the position which he has obtained, or to treat with them, that he may be allowed to maintain it: they can claim no right under such circumstances, which the owner could not grant.

Cadwalader's covenant binds him to aid the work by advancing money in proportion to the progress of the work. But as soon as the work commenced the builder's liens commenced, and it is argued that as Cadwalader had then advanced no money, their liens took precedence of his, and that, of consequence, he was not bound by his covenant to make advances, and those made after that were voluntary, and could not cut out the builders' liens.

This argument begins by assuming the proposition which has already been disproved, that the advances and not the mortgage created the lien; though the contract with the parties is, with notice to all the world, expressly otherwise. It is arguing in a circle, by using the conclusion as a means of proving itself.

Next, the argument makes the commencement of the work, for which Montgomery had Cadwalader's covenant to aid him, the very ground of relieving Cadwalader from his covenant. The commencement of the work created a prior lien, and therefore Cadwalader is excused from making his advances until that is removed. This is to make the contract defeat itself: it makes it void from the beginning, because it is impracticable: and the houses can never be erected, because the first shovel full of earth removed, creates a lien, that shuts down the coffers out of which it is to be paid for; or the laying of the first floor of joists on these thirty-two houses, stops their further erection, because it creates a lien that cuts off the mortgage by which the money was to be supplied.

If the owners of these liens trusted Montgomery without examining the state of the records, the law provides no relief from the consequences of their negligence, and morality does not demand that it should, and even charity will not allow it at the expense of more careful men. If they did examine the records, then they found the lien of Cadwalader standing good against Montgomery, and honestly forbids them to cut it out for their profit. If they found it and still trusted Montgomery without inquiry, then they agreed to trust him even with a lien against him of \$12,000, and with no

apparent means to pay them. If they made inquiries, then they learned that he would have \$12,000 in hands to pay for the improvements he was making, and they trusted him that he would appropriate it properly. In no way that we can regard this case can we perceive that the appellants have any show of equity, to demand that their claims shall be preferred to the mortgage.

Decree affirmed at the cost of the Appellants.

WOODWARD and KNOX, JJ. dissented.

*Common Pleas, Philadelphia County, Pa., 1824.*

PERRY vs. KINLEY.

Under the rules of the Courts of Equity in Pennsylvania, a defendant may by answer protect himself against discovery, through a denial of the complainant's title, to the same extent as he could by plea in England; and he is not deprived of this right by submitting unnecessarily to answer some of the interrogatories of the bill, against which he might also have protected himself.

In Equity. Exceptions to answer.

THOMPSON, P. J.—The exceptions taken to the sufficiency of the answer, are based upon the rule of the English Chancery Courts, that a defendant who submits to answer, must answer fully—at least so far as to enable the plaintiff to have a decree against him. It was for a long time an unsettled question whether the defendant could in his answer deny the plaintiff's right, and refuse the discovery, to which the right, thus denied, alone entitled the defendant.

This manner of pleading which Lord Eldon, in *Shaw vs. Ching*, 11 Ves. 305, styles a sort of illegitimate pleading, and in *Somerville vs. Mackay*, 16 Ves. 387; speaks of as inconvenient, seems, to have been abandoned in England, in conformity with the views of Sir John Leach, V. C., expressed in *Mazeraddo vs. Maitland*, 3 Mad. 66; and in——— vs. *Harrison*, 4 Mad. 252, in which the

rule that a party cannot by his answer, protect himself from answering, is considered settled. In New York also, this general rule prevails, to which there are but few well established exceptions. *Bank of Utica vs. Messereau*, 7 Paige, 71.

In those Courts the defendant can object to the discovery sought, only by demurrer or plea—where, however the case requires an answer to sustain the plea, in order to give the plaintiff the advantage of such facts as are within the defendant's knowledge, and would tend to support the plaintiff's case, *Thring vs. Edgar*, 2 S. & S., 457; it is sometimes difficult to ascertain the limits to which the plea and answer are severally to extend. If the answer disclose too much, the plea is considered to be overruled, and if not sufficiently full, upon argument of the plea, every fact stated in the bill and not denied by the answer, must be taken as true—*Roche vs. Mogell*, 2 Sch. & Ves., 724; *Jones vs. Davis*, 16 Ves. 262.

To avoid these difficulties, and in order to simplify an abstruse subject, our Supreme Court, have adopted the form of pleading, so little regarded in England, and by an express rule permits a defendant to insist upon all matters of defence in his answer, either in law or to the merits of the bill of which he may be entitled to avail himself by plea. Whenever a plea will protect him from discovery, his answer will have the same effect. It is not denied that in the case before us, the defendant might by a plea, have protected himself from the discovery sought by the interrogatories, to which it is alleged he has not fully answered. By his plea he might have put the plaintiff upon proof of the alleged trust, and having denied the existence of such trust by his answer, he is equally protected from the discovery called for. That the defendant has answered a part of the interrogatories more fully than was necessary, and thus afforded to the plaintiff evidence of facts which he might have refused to disclose, while he explicitly denies the *principal fact* of the trust, cannot under the circumstances of this case, deprive him of the benefit of the rule of Court. He is still protected from the discovery which a plea would have avoided. The exceptions taken on this ground are therefore overruled.

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## LEGAL MISCELLANY.

## LEGAL PRINCIPLES.

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No. II.

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In the last number but one of the Law Register, under the head of "Law in the United States," we endeavored to show that the courts and profession in this country, are compelled to view the law more as a system of principles, than is usual in the English practice; and to represent the advantages of yielding at once to this necessity. In the present article, which we have numbered TWO, and in some succeeding ones, in which we shall preserve our present heading, we propose to follow up this view, and among other things to make some suggestions concerning the nature of legal principles; how they are introduced into the law, and how learned by its practitioners; how the correctness of a proposed principle is to be tested; how applied to new cases, and various like points. And if we seem to do this in an off-hand, rambling way, it will be, not because we have any doubt of either the general correctness, or the importance of our suggestions, which we shall try to make in language sufficiently precise; but because we will not burden the minds of our readers, already worn by severe professional labors, with anything needlessly dull. We had rather be suspected, by those who may fail to appreciate our remarks, of not being profound.

Law, in the sense of the law of the land, is but an emanation of natural justice, limited and modified by technical rules. Justice goes by rules, as much as the planets do; and these rules of natural justice, and these technical rules, together make up our system of legal principles.

We all remember our childhood, and how, when the first "sum" was set us in arithmetic, pleasure mantled in our cheeks, as we learned that by striking off the first line of figures, adding together what were below, and then adding this result to that first line, we brought out the same grand total, as when we added the whole. We had before learned the fact that there were several ways to the school-house; but that there should be more ways than one in such a magnificent transaction as solving a great mathematical problem,



was both new and delightful. Here is wisdom for the wise. Not alone in the exact science of mathematics, from its lowest to its most abstruse branches, are there a variety of methods for reaching the same result, but this fact, or law, as we may choose to call it, is nearly or quite universal, pervading all things. It certainly pervades our jurisprudence to an extent quite beyond what is dreamed by the casual observer.

No professional man of any observation has failed to notice, that some judges will come to remarkably accurate opinions at first impression, but when they reflect, or look for a reason, they are immediately enveloped in mist; while, on the other hand, others are hesitating or inaccurate at first, but are brought to clear and just conclusions, lucidly reasoned, at last; and the favored few unite the better qualities of both these classes, leaving the poorer qualities to be blended together in some others, who are not judges. So it is, in and out of the profession. There are men whose natural, uneducated sense will bring them, at first impression, to more just conclusions upon a legal question, not technical in its nature, than the most mature learning in other men, until the latter have made an exact investigation of the particular case. Now, these and other like facts are explainable upon the doctrine of various processes for reaching the same result, and the diverse qualities of men's minds. There is a natural sense in the human understanding, stronger and clearer in some persons than in others; in all more or less obscured or misdirected by vices of education, by previous false impressions, and perversions of the reasoning powers, which points to what is right under each given state of facts. In the earlier periods of the law, this was a principal guide to the judges, and it is more or less a guide still. But, as we have said, all things go by rules. And for attaining the same result, a more accurate and sure method, if we are qualified to practice it, is to look at the rules, and observe what they bring forth. These rules in the law are, as we have said, legal principles. We may employ them as we do mathematical propositions, often working out the same result by various and diverse formulæ. How they are to be learned, how their correctness tested, how they operate, and the uses we are to make of them, are inquiries reserved for future numbers.

J. P. B.

## NOTICES OF NEW BOOKS.

The Practice of the Courts of Justice in England and the United States. By Conway Robinson, of Richmond, Va. Vol. I. Richmond: A. Morris. 1854.

The occasional exchange of "new lamps for old," however improper may have been the motives of the mythic originator of that practice,<sup>1</sup> cannot be too much commended. It is especially important with regard to law books; of which, edition must constantly be replaced by edition, or else be left stranded and useless by the changing tide of jurisprudence. The demands of this unceasing progress are implacable; we must keep ourselves ever close upon the heels of the Atlanta of law. The patient accumulations of the past serve only as a foundation for the labors of the future. The lawyer piles case upon case, treatise upon treatise, Ossa upon Pelion, but the sky is never reached. Our libraries, in their tedious but unending growth, are like the coral formations of the Pacific, which, we are told, are the result of the vain efforts of despairing insects to keep at the surface of a sea, whose level is continually advancing. The law writer more emphatically feels the burthen of the task. There is, indeed, no breathing spell in the race between judges and authors—between case makers and case collectors. Pause we dare not—

"To have done, is to hang  
Quite out of fashion, like a rusty mail,  
In monumental mockery."

Mr. Robinson has more than satisfied the necessity which the lapse of twenty years since the publication of his book of practice has thus imposed upon him. He has given us not merely a new edition, but in reality a new book, upon a much enlarged plan, and with great additions and improvement. The work is now intended to be applicable, not merely to Virginia, but to the whole of the United States.

In this view, however, if we are to judge by the present volume, which is only the first instalment of a long series, and by the intimations of the preface, the title of the book is somewhat of a misnomer, and by no means does justice to the character of its contents. Reversing the plan of a modern prospectus, the promise falls greatly short of the performance.

<sup>1</sup> See Aladdin's case, stated 1 Arabian Nights, 500.

Now-a-days, when the air is hideous with the clangor of self-blown trumpets from every house-top and highway, the modest announcement even of a really good book like the present, is so rare, that its occurrence is quite a matter for gratitude. But we cannot think that this reticence is always as judicious as it is in good taste. "The world is governed by labels," was the induction of a veteran wine-drinker, from a wide experience; and the axiom is as true both as to books and bottles. A proper coinage stamp is a great help to ordinary people who have not the means of judging, off-hand, of the value of gold by its purity and weight. To drop metaphor, we doubt whether many, from Mr. Robinson's title-page, would guess the extent and importance of his plan. Books of practice, from such venerable relics as "Styles' Register," or "The Attorney's Guide," to the classic Tidd, or the microscopic Archbold, constitute a class whose peculiar function is well known. They are necessary nuisances, filled with the barren details of procedure, such as no lawyer cares to burthen his memory with, but to which, if he have a soul above judicial buttons, he turns with disgust. They are about as instructive reading as a cookery book, or a pharmacopœia. Dr. Paley used to illustrate his dislike to the over division of labor, by inquiring what sort of account a man who had spent his life in manufacturing heads of pins could render at the last; and in the same manner it would be worth considering what must be in the end the mental condition of a lawyer who has passed his days in the study of a book of practice. Now, Mr. Robinson's work is just the reverse of all this. His purpose appears to be the development of the common law, on its practical side, indeed, but still with a fullness and in a scientific mode of treatment, which have hitherto been employed only on its abstract or theoretical side. He gives not merely the intricate machinery of the various forms of action or remedies, but also the material upon which actions or remedies are employed, and its mode of preparation. It is the dynamics instead of the statics of jurisprudence; or, as when it is employed in the Arts, we speak of *applied* chemistry, so Mr. Robinson's idea seems to have been to furnish the profession with a treatise on *applied* law. The idea is original, and well carried out.

The first volume, which is the only one as yet published, is devoted to the consideration of "the place and time of a transaction or proceeding;" under which division the conflict of laws and the statute of limitations are chiefly treated of. Under the head of conflict of laws are considered the subjects of fugitives from justice and from slavery, of guardianship, and

the like; of contracts, of marriage and divorce, of property, of the estates of decedents, and of decrees and judicial acts; so far as all these are affected by that conflict; the mode in which foreign laws and the like are to be proved; war and alienage in their effect on person and property; the effect of the place of the proceeding upon the parties and procedure of a suit; the effect of a suit beyond the jurisdiction; and finally, the question as to the tribunal which is to be selected, and the extent of the jurisdiction of any special Court. Under the head of "Time of a transaction or proceeding" are considered, the effect of Sundays and holidays thereupon; the computation of time; and the time for bringing personal actions generally. Within the latter division, fall questions as to when an action can be brought for breach of contract, with relation to the time of performance; and finally, the broad subject of the statute of limitations.

We have not space to devote to even a general examination of the manner in which these subjects are discussed; but we may state, that it is done with great learning and ability, and with much copiousness of reference to cases, both the most recent and the most authoritative, in England and the United States. The authorities are not carelessly thrown together, as is too often the case at present, but are made the subject of comparison and comment in the spirit of free and independent inquiry. Among his criticisms we may mention one, upon a couple of Pennsylvania cases, which is worthy of attention here, though we are not altogether prepared to admit its validity. Mr. Robinson is discussing the question as to how far the statute of limitations applies as between the maker and endorser of a note, when the latter has been obliged to pay. He says: "In Pennsylvania the case has arisen, of an endorser of a note whose remedy to be reimbursed what he had paid in discharge of the note was barred if his only remedy was by an action on the note itself, but not barred if the law would raise an *assumpsit* by implication to redress him; and yet it has been gravely maintained that the law will not raise such an *assumpsit*, 'because there is no necessity for it!' 2 Whart. 358-9. The case is there put of an endorser who is unable to pay a note before the lapse of six years after it became payable, and then becoming able, is compelled to pay it under a judgment obtained against him in a suit commenced before the six years had run out; and under the rule which the Court is maintaining, he would be unable to maintain an action against the principal for the money paid. Seeing the injustice of this, the Court says, 'he may guard against it, if he will, by taking an indemnity under seal.' *Kennedy vs.*

*Carpenter*, 2 Whart. 359. This is now the acknowledged rule in Pennsylvania. An endorser of an accommodation note can there recover from the maker only on the contract of endorsement, and not on an implied *assumpsit* for money paid to his use within six years before suit brought. In the case of a note payable in 1833, and judgment thereon in 1836 against the endorser, who paid it in 1841, his action brought in 1843 was held to be barred. *Farmers' Bank vs. Gilson*, 6 Barr, 51."—1 ROBINSON'S PRACTICE, 295.

After mentioning similar decisions in New York, the author shows that it has been held that a part payment by the endorser would take the case out of the statute, and comments strongly on the inconsistency of the doctrine, which he considers, moreover, to be not in accordance with the English cases. Yet, however harsh the principle of *Kennedy vs. Carpenter* may seem at first sight, it really seems to us correct, both upon technical and substantial grounds. The reasoning of that case is that the law will not raise an implied *assumpsit*, even to indemnify a surety, where there is already an express contract, about which there can be no doubt; and therefore, as there is an express promise on the face of a note, to pay the endorser, that he can sue only thereupon, and within the period of the original limitation. The English cases cited by Mr. Robinson, are those of accommodation *acceptors*, which depend upon the opposite principle; for there is no express promise by the drawer to pay the acceptor of a bill, and therefore, in the case of an accommodation acceptance the undertaking to indemnify must be raised by the law, on which, according to the general rule, well stated by Mr. Robinson, there is no right of action till the acceptor is obliged to pay. There is, to be sure, an inconsistency between the two classes of cases, starting as they do from different points; but that inconsistency can be no more objected, with justice, to the former than to the latter class. Nor do we find that the anomaly, that a part payment by the endorser takes the case out of the statute, while entire payment does not, really exists. For if the case of *Bullock vs. Campbell*, which is cited from 9th Gill, decides that an action for part payment by an endorser *within* the six years, starts the statute afresh, that is nothing more than the ordinary rule on the subject; and it might just as well be urged against that as an inconsistency, that if a debtor pays none of the debt within the period of limitation he is protected, while if he pays part he is still liable. But if the case referred to decides that an action can thus be brought *after* the six years, then all that need be said is, that it is not in accordance with the other authorities.

It must not be forgotten, moreover, that the statute is intended for the protection of the debtor, and is not to be moulded to suit the convenience or necessity of the creditor. That protection would be nugatory if the liability of the maker of a note were to continue till he was reached by the first of a long series of endorsers after consecutive litigations in which each man may have run to the end of his tether of limitation. In short, all the reasons upon which the statute is based, such as the destruction of receipts, the death of witnesses, the abandonment of securities, and a hundred others, apply just as strongly in favor of a maker, where there are twenty endorsers on a note, as where it still remains in the hands of the original payee. And, finally, the hardship of the endorser's case is not so very apparent when we consider, that as he must receive immediate notice of non-payment by the maker, he knows as soon as the *statute begins running*, that he is looked to by the holder, so that if he does not choose to take up the note, and turn round on the maker, within the period limited, the loss of his remedy over, is just as much the result of his own carelessness, as if the debt was primarily due to him. Whatever may be said, however, in justification of the decisions of Pennsylvania and New York on the subject, it cannot be denied that Mr. Robinson has stated ingenious and forcible objections to them, which will deserve the consideration of the bench in these States.

We have to say in conclusion, that we regard Mr. Robinson's book as an extremely valuable and important contribution to legal science. It might, perhaps, be suggested as a blemish upon the general execution of the work, that its analytical division or table of contents, is not plotted out with as much distinctness as could be desired, so that the connection of the different titles and chapters, and the method of transition from one branch of the subject to another, appear at first somewhat obscure. But this is a difficulty which, with a little consideration, is readily overcome, and where all else is so good, it would be ungracious to dwell upon what is really a very trifling defect, and one which will doubtless be hereafter amply supplied.

A Manual for the use of Notaries Public, comprising a summary of the Law of Bills of Exchange and of Promissory Notes—both in Europe and the United States—Checks on Bankers, and Sight-bills, with approved forms of Protest, and notice of Protest, and references to important legal decisions; adapted to the use of Notaries Public and Bond Officers. By Bernard Roelker, A. M., of the Boston Bar. New York: G. P. Putnam & Co., 1853. 178 pp. 8vo.

The title of this book, which we transcribe at length, indicates with sufficient distinctness its nature and objects. Though we possess in general the proper professional dislike to manuals, and the other short-hand methods of cramming law into laymen, which "enterprising publishers" occasionally inflict upon society, we must except from the rule of condemnation this accurate and convenient little treatise, both on account of its subject and its manner of preparation. A work of the kind is continually needed by the class to which it addresses itself. From the character of their business, they must frequently be called upon to solve in action, questions upon the law of bills and notes, which even a well-read lawyer would hesitate to answer off-hand. This being so, the Notary Public, who very rarely has had any legal training, must need at his elbow some safe guide to which he can turn with confidence in an emergency for the requisite information. Such, we can state from examination, is the work before us. It is a compact and careful summary of the law on the subjects of which it treats, with a collection of the statutes and notes of the principal decisions bearing thereon. A *resumé* of the law of the continent of Europe with regard to bills and notes is prefixed, and will be found of very considerable value.

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Professional Ethics. By George Sharswood. Philadelphia: T. & J. W. Johnson. 1854.

We have received a copy of this well-timed and well-written pamphlet, but unfortunately too late for anything but the briefest notice at present. A more extended review will find a place in our next number. In the meantime we may say, that the work is one whose plan and execution will receive the most earnest commendation from every lawyer who has the true interests of his profession at heart.

THE  
AMERICAN LAW REGISTER.

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FEBRUARY, 1855.  
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SHARSWOOD'S PROFESSIONAL ETHICS.<sup>1</sup>

THE author is well qualified to treat the subject, which he discusses, as he brings to his work, not only great abilities and learning, but a long and extensive practical experience, both at the bar and on the bench. He has felt the perplexities and embarrassments of the lawyer, his temptations and his duties. He has experienced the facility of resisting all inducements to do wrong, under the protection of high principles and the love of right, and he has seen how easy it is, without that protection, to fall into the meshes of the unscrupulous, and become the victims of the depraved. He can tell of the rewards awaiting all who industriously pursue their high calling, and steadily practice it under the guidance of truth and integrity; and he can point out the certain ignominy of those who reject such control, and their almost certain failure to obtain any compensation for their degradation.

The office of Presiding Judge of the District Court, for our great

<sup>1</sup> A Compend of Lectures on the Aims and Duties of the Profession of the Law, delivered before the Law Class of the University of Pennsylvania; by Geo. Sharswood, Professor of the Institutes of Law. Philadelphia: T. & J. W. Johnson.



city, in which so large a mass of diversified business is constantly transacted, and where, in almost every possible manner, each member of the bar must present himself, affords the author the opportunity, not only of accurately testing the learning and ability of each member of the bar, but also of perceiving every failure in truth or rectitude, and usually the motive of that failure and its character. He can tell whether it arises from the utter worthlessness of the man's general nature, or from some mental or physical inferiority, and whether it is habitual or otherwise; if the latter, how it has occurred, whether it is a first offence, and with what likelihood its repetition may be expected.

Emanating from an experienced lawyer and judge, the book will prove an incentive to the student and young practitioner, to choose and adhere to the side of morality and virtue, and we hope its warning voice will save many from falling into evil habits. As the maxim, "*ce n'est que le premier pas qui coute*," is so correct, that we find few who once commit an offence refrain from its repetition, it is of the utmost importance to warn those who will be exposed to temptation, of its existence, and its strength, and to exhibit to them the bitter consequences of yielding, and the enjoyment and advantages of resistance.

But another object will be effected. Right and wrong are generally words of relative meaning; any one using them has before him some standard by which he tries an action, and he pronounces it to be right or wrong as it may come up to or fall short of his measure. Every community, in like manner, have a more or less definite rule, generally adopted and approved, so that no matter how a man may test his own heart or his own conduct, he will not apply to the act of any fellow member a higher test than that which is commonly regarded as the standard. Now ordinarily it will be found, that almost all the members of any body will conceive it unnecessary to guide their own conduct by any other rule of right than that which has been and is approved by their fellows. Still, when any one of weight of character demonstrates the defect of this common scale of conduct, and supports his objections by sound reason, he is nearly sure to effect an

amendment of the evil. Mankind have a beau ideal of excellence, and virtue is loved by most men for its own sake; a teacher of a high morality has, therefore, less difficulty than might at first be supposed in effecting, at least, an external change in those whom he addresses.

Judge Sharswood's book probably places higher the ordinary standard of a lawyer's rectitude—and it cannot be thought that his labor will be in vain. If a doubt can be excited as to the propriety or impropriety of any course, no worthy man will hesitate to decide the case on the safe side, and to act more rigidly than might be *necessary*—thus, in a short time, all who are anxious to do right, will establish for themselves a stricter rule of conduct which, being settled, will speedily by general consent be imposed upon all the community.

There is still another manner in which Judge Sharswood will do good. Very many persons, not lawyers, conceive that the practice of the law necessarily infringes on the rules of morality; and this, notwithstanding, the same persons are compelled to admit that almost every distinguished lawyer, whom they know personally or by reputation, is an eminently honorable and upright man—fearing God and loving his neighbor. Now, the exhibition of the facts in regard to the practice of the law completely removes the supposed foundation for this vulgar prejudice.

“That lawyers are as often the ministers of injustice as of justice is the common accusation in the mouth of gainsayers against the profession.

\* \* \* \* \*

“It may be answered in general:—

“Every case is to be decided by the tribunal before which it is brought for adjudication upon the evidence, and upon the principles of law applicable to the facts as they appear upon the evidence. No court or jury are invested with any arbitrary discretion to determine a cause according to their mere notions of justice. Such a discretion vested in any body of men would constitute the most appalling of despotisms. Law, and justice according to law—this is the only secure principle upon which the controversies of men can

be decided. It is better on the whole that a few particular cases of hardship and injustice, arising from defect of evidence or the unbending character of some strict rule of law, should be endured, than that general insecurity should pervade the community from the arbitrary discretion of the judge. It is this which has blighted the countries of the East as much as cruel laws or despotic executives.

\* \* \* \* \*

“Now the lawyer is not merely the agent of the party; he is an officer of the court. The party has a right to have his case decided upon the law and the evidence, and to have every view presented to the minds of his judges, which can legitimately bear upon that question. This is the office which the advocate performs. He is not morally responsible for the act of the party in maintaining an unjust cause, nor for the error of the court, if they fall into error, in deciding it in his favor. The court or jury ought certainly to hear and weigh both sides; and the office of the counsel is to assist them by doing that, which the client in person, from want of learning, experience, and address, is unable to do in a proper manner. The lawyer, who refuses his professional assistance because in his judgment the case is unjust and indefensible, usurps the function of both judge and jury.

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“Much interest was excited some years ago in England, by the circumstances attending the defence of Courvoisier, indicted for the murder of Lord William Russell. The crime was one of great atrocity. It came out after his conviction, that during the trial he had confessed his guilt to his counsel, of whom the eminent barrister, Charles Phillips, Esq., was one. Mr. Phillips was accused of having endeavored, notwithstanding this confession, to fasten suspicion on the other servants in the house, to induce the belief that the police had conspired with them to manufacture evidence against the prisoner, and to impress the jury with his own personal belief in the innocence of his client. How far these accusations were just in

point of fact was the subject of lively discussion in the newspapers and periodicals of the time.<sup>1</sup>

"On Tuesday night, May 5th, 1840, Lord William Russell, infirm, deaf, and aged, being in his seventy-third year, was murdered in his bed. He was a widower, living at No. 14 Norfolk street, Park Lane, London, a small house, occupied by only himself and three servants,—Courvoisier, a young Swiss valet—and two women, a cook and housemaid. The evidence was of a character to show very clearly, that the crime had been committed by some one in the house; but, Courvoisier's behaviour throughout had been that of an innocent man. Two examinations of his trunks, by the officers of the police, showed nothing suspicious; rewards having been offered by the government and family of the deceased, for the detection of the criminal, a third examination was made of Courvoisier's box, which resulted in the discovery of a pair of white cotton gloves, two pocket handkerchiefs, and a shirt-front, stained with blood. The prisoner's counsel went to the trial, with a full persuasion of his innocence, and conducted the cross-examination closely and zealously, especially of Sarah Mancer, one of the female domestics, with a view of showing that there was as much probability, that the witness or the other domestic, was the criminal, as the prisoner; and that the police, incited by the hopes of the large rewards offered, had conspired to fasten the suspicion unjustly on him. At the close of the first day's proceedings, the prosecutors were placed unexpectedly in possession of a new and important item of evidence; the discovery of the plate of the deceased, which was missed, and that it had been left by the prisoner at the place where it was found, about a week, perhaps only a very few days before the committing of the murder. The parcel contained silver spoons, forks, a pair of gold auricles, all unquestionably the property of the unfortunate nobleman; and the only question remaining was, whether Courvoisier was the per-

<sup>1</sup> Law Magazine, February, 1850, May, 1854. Law Review, February, 1850. Several articles on the subject, taken from the English press, are to be found in *Littell's Living Age*, vol. 24, pp. 179, 230, 306. I have added, in an appendix, Mr. Phillips's vindication of himself from these charges, in his correspondence with his friend Mr. Warren, preceded by a brief statement of the case.

son who had so left it. If he were, it would of course, grievously for him, increase the *probabilities*, that it must have been he, who subsequently committed the murder, and with the object of plunder. On the ensuing morning, the person who had made this discovery (Mrs. Piolaine, the wife of a Frenchman, who kept a place of entertainment, called L'Hotel de Dieppe, in Leicester Place, Leicester Square), was shown a number of prisoners in the prison-yard, one of whom was Courvoisier, whom she instantly recognized as the person who had left the plate with her, and also had formerly lived in her employ. Courvoisier also suddenly recognized her, and with dismay. The immediate effect of his panic was the confession of his guilt to his counsel at the bar of the court, a few minutes afterwards, coupled with his desire, nevertheless, to be defended to the utmost. His probable object was simply to prepare his counsel against the forthcoming evidence. The prisoner was convicted, and afterwards confessed his crime. Mr. Phillips's conduct of the defence was criticized at the time in the columns of the *Examiner*, but he suffered it to pass in silence. In 1849, that periodical renewed the accusation originally made, upon which the following correspondence appeared in the *London Times* of Nov. 20th, 1849.

TO THE EDITOR OF THE "TIMES."

"SIR,—I shall esteem it a great favor if you will allow the accompanying documents to appear in the 'Times.' Its universal circulation affords me an opportunity of annihilating a calumny recently revived, which has for nine years harassed my friends far more than myself.

"I am, &c.,

"CHARLES PHILLIPS.

"39 Gordon Square.

"*Inner Temple, Nov. 14, 1849.*

"MY DEAR PHILLIPS,—It was with pain that I heard yesterday of an accusation having been revived against you in the '*Examiner*' newspaper, respecting alleged dishonorable and most unconscientious conduct on your part, when defending Courvoisier against the charge

of having murdered Lord William Russell. Considering that you fill a responsible judicial office, and have to leave behind you a name unsullied by any blot or stain, I think you ought to lose no time in offering, as I believe you can truly do, a public and peremptory contradiction to the allegations in question. The mere circumstance of your having been twice promoted to judicial office by two lord chancellors, Lord Lyndhurst and Lord Brougham, since the circulation of the reports to which I am alluding, and after those reports had been called to the attention of at least one of those noble and learned lords, is sufficient evidence of the groundlessness of such reports.

"Some time ago I was dining with Lord Denman, when I mentioned to him the report in question. His lordship immediately stated that he had inquired into the matter, and found the charge to be utterly unfounded; that he had spoken on the subject to Mr. Baron Parke, who had sat on the bench beside Chief Justice Tindal, who tried Courvoisier, and that Baron Parke told him he had, for reasons of his own, most carefully watched every word that you uttered, and assured Lord Denman that your address was perfectly unexceptionable, and that you made no such statements as were subsequently attributed to you.

"Lord Denman told me that I was at liberty to mention this fact to any one; and expressed in noble and generous terms his concern at the existence of such serious and unfounded imputations upon your character and honor.

"Both Lord Denman and Baron Parke are men of as nice a sense of honor and as high a degree of conscientiousness as it is possible to conceive; and I think the testimony of two such distinguished judges ought to be publicly known, to extinguish every kind of suspicion on the subject.

"I write this letter to you spontaneously, and, hoping that you will forgive the earnestness with which I entreat you to act upon my suggestion, believe me, ever yours sincerely,

"SAMUEL WARREN.

"*Mr. Commissioner Phillips.*"

We should be glad if the limits of this article would permit us to add Mr. Phillips' own noble and indignant refutation of the libel on him, and we thank Judge Sharswood for having spread all the facts of the case before the American public; for we must frankly admit, that although we learned at the time of the occurrence the libellous accusation against Mr. Phillips, we had neither seen nor heard of his refutation of it. The case attracted attention all over the world, from the union of the illustrious character of the murdered man and the atrocity of the assassination. A report or notice of the case thus became a safe and easy vehicle for the wide dissemination of a libel upon Mr. Phillips, the distinguished counsel who conducted the defence of the murderer. We felt, in common, it is to be presumed, with other members of the bar, that Mr. Phillips' alleged conduct was indefensible, and that the character of the profession was degraded by it. The appendix to the work under review shows how completely unfounded and malignant this libel was; and we rejoice in aiding the circulation of its refutation.

Judge Sharswood examines in great detail, and illustrates with much learning the subject of professional compensation. As generally in this country the two offices of an attorney, and barrister, or counsellor at law, are united in the same person, we need only refer to the compensation of the latter. In England, as in ancient Rome, the advocate has no legal right to demand his fee—it is a voluntary payment, almost always freely given, and in proportion to the merit and services of the counsel. This was formerly the rule in Pennsylvania—but the Supreme Court have unhappily established a different doctrine. It has been an unfortunate change for the public. Many clients have in consequence been oppressed by exorbitant charges, and it has operated injuriously to the tone and character of the profession. A lawyer's services cannot be appraised like a lot of ground or a bale of merchandise. The latter have precisely ascertainable prices. The relative quality of the article can be definitely determined; but how shall the value of the services of counsel be measured? They depend upon various indefinite elements—such as the amount of time and labor bestowed on the business—the importance or value of it—the ability of the client to pay



—and last, but the most material of all—the value of the time and labor given by the counsel himself—if it must be put into mercantile language, “what other people will pay for it.” Any lawyer, we think, will say, that in his experience, in almost every case where this matter has been brought into discussion, wrong has been done to the client. Few able, not to say distinguished advocates, will allow the value of their services to be passed upon as a question of fact by a jury. Should their charges be disputed, they will at once waive them—while on the other hand, those entitled to little or no consideration will claim, and generally under the rules of evidence, can compel such a payment as could only be awarded under the most favorable circumstances to the most distinguished. Specious arguments are certainly adduced against this view of the subject.

“The question really is, what is best for the people at large,—what will be most likely to secure them a high-minded, honorable bar? It is all-important that the profession should have and deserve that character. A horde of pettifogging, barratrous, custom-seeking, money-making lawyers, is one of the greatest curses with which any State or community can be visited. What more likely to bring about such a result than a decision, which strips the bar of its character as a learned profession, on the principle avowed by one court, that it is now a calling as much as any mechanical art,—or by another, in effect, that the order of things is in the present condition of society reversed, and clients are really the *patrons* of their attorneys. \* \* \* \* \*

“Every judge, who has ever tried a case between attorney and client, has felt the delicacy and difficulty of saying what is the measure of just compensation. It is to be graduated, according to a high legal authority, with a proper reference to the nature of the business performed by the counsel for the client, and his standing in his profession for learning and skill; whereby the value of his services is enhanced to his client.<sup>1</sup> Is then the stand-

<sup>1</sup> *Vilas v. Downer*, 21 Vermont, 419. Responsibility in a confidential employment is a legitimate subject of compensation, and in proportion to the magnitude of the interests committed to the agent. *Kentucky Bank vs. Combs*, 7 Barr, 548.



ing and character of the counsel in his profession for learning and skill to be a question of fact to be determined by the jury in every case in which a lawyer sues his client? How determined, if necessary to the decision of the question? Not surely by the crude opinions of the jurors; but by testimony of members of the same profession on the subject. This never is done; it would be a very difficult as well as delicate question for a lawyer to pronounce upon the standing of a professional brother. The most that can be done, is to call gentlemen to say what they would have considered reasonable for such services, had they been performed by themselves. Some may testify up to a very high point, from an excusable, though foolish vanity; others to a very low one, from the despicable desire of attracting custom to a cheap shop.<sup>1</sup> I have never seen such a cause tried without feeling that the bar had received by it an impulse downwards in the eyes of bystanders and the community. The case is thrown into the jury box, to be decided at hap-hazard, according as the twelve men may chance to think or feel.

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“But it appears to me, that it must be an extraordinary—a very peculiar case—that will justify an attorney in resorting to legal proceedings, to enforce the payment of fees. It is better that he should be a loser, than have a public contest upon the subject with a client. The enlightened bar of Paris, have justly considered the character of their order involved in such proceedings; and although by the law of France, an advocate may recover for his fees by suit, yet they regard it as dishonorable, and those who should attempt to do it, would be immediately stricken from the roll of attorneys.”

The notice of this book has already occupied so much of our space, that we must pass over Judge Sharswood's able remarks on the debasing effects of contingent fees, or “an agreement to receive a certain part or proportion of the sum, or subject-matter, in the event of a recovery, and nothing otherwise,” pp. 85, 86.

The appearance of this work we trust will be the commencement of

<sup>1</sup> That evidence of usage is admissible to show what is the rule of compensation for similar services to those sued for, see *Vilas vs. Downer*, 21 Vermont, 424; *Badfish vs. Fox*, 23 Maine, 94.

a new era in the history of our bar—in bringing prominently before its members the subject of their personal deportment and conduct as professional men; and we trust, that it will lead to the adoption of a higher standard of morality for themselves, and of greater politeness and deference for each other and for the bench; which latter will be reciprocated by the judges. If our aim is raised, our range will be higher. Let the leading members of the bar demand of the others an elevated moral tone in all their acts, and the requisition must be complied with. Truth is the basis of all virtue—but more emphatically of legal morality.

“Truth in all its simplicity—truth to the court, client, and adversary—should be indeed your polar star. I have observed the influence of only slight deviations from truth upon professional character. A man may as well be detected in a great, as a little lie. A single discovery among professional brethren of a failure of truthfulness, makes a man the object of distrust, subjects him to constant mortification, and soon this want of confidence extends itself beyond the bar to those who employ the bar. That lawyer's case is truly pitiable, upon the escutcheon of whose honesty or truth rests the slightest tarnish.

“Let it be remembered and treasured in the heart of every student, that no man can ever be a truly great lawyer, who is not, in every sense of the word, a good man. A lawyer, without the most sterling integrity, may shine for awhile with meteoric splendor; but, depend upon it, his light will soon go out in blackness of darkness. It is not in every man's power to rise to eminence, by distinguished abilities. It is in every man's power, with few exceptions, to attain respectability, competence, and usefulness. The temptations which beset a young man in the outset of his professional life, especially if he is in absolute dependence upon business for his subsistence, are very great. The strictest principles of integrity and honor are his only safety. Let him begin by swerving from truth or fairness, in small particulars, he will find his character gone—whispered away, before he knows it. \* \* \* \* \*

“The covert, indirect, and insidious way of doing anything, is always the wrong way. It gradually hardens the moral faculties, renders obtuse the perception of right and wrong in human actions,

weighs everything in the balances of worldly policy, and ends most generally, in the practical adoption of the vile maxim, 'that the end sanctifies the means.' If it be true, as he has said, who, more than any mere man, before or since his day, understood the depths of human character, that one even may,

'By telling of it,  
Make such a sinner of his memory;  
To credit his own lie:—

be careful never to speak or act, without regard to the *morale* of your words or actions. The habit may and will grow to be a second nature.       \*       \*       \*       \*       \*       \*

"There is no class of men among whom moral delinquency is more marked and disgraceful than among lawyers. Among merchants, so many honest men become involved through misfortune, that the rogue may hope to take shelter in the crowd, and be screened from observation. Not so the lawyer. If he continues to seek business, he must find his employment in lower and still lower grades; and will soon come to verify and illustrate the remark of Lord Bolingbroke, that 'the profession of the law, in its nature the noblest and most beneficial to mankind, is in its abuse and abasement, the most sordid and pernicious.' "

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### JUDGMENTS OF OTHER STATES.

The following notice of some recent cases is offered as a supplement to Judge Hare's valuable note to *Mills vs. Duryee* and *McElmoyle vs. Cohen*, in the second volume of the *American Leading Cases*, p. 774.

The difficulty anticipated by Mr. Justice Johnson, in his dissenting opinion, in the case of *Mills vs. Duryee*, 7 Cranch, 481, has lately been presented to the Supreme Court of the United States, and received a solution in accordance with his views.

In *D'Arcy vs. Ketchum*, 11 Howard, U. S. R., 165 (decided in 1850), it was held that a judgment against joint debtors, rendered

in the State, of New York, upon service of process on one only of the joint debtors, was of no effect, in the State of Louisiana, against the debtor not served, although the statute of New York provided that in New York it should bind the joint property of the defendants, and be *prima facie* evidence of the indebtedness of the defendants not served. The court admit that such was the effect of the record in New York, but they deny that the Constitution and the Act of Congress, of May 2, 1790, as construed in the case of *Mills vs. Duryee*, extended to such a judgment as the international law at that time refused to recognize; (as, for example, a judgment without service of process or appearance) or declared a new rule, enabling one state to enact laws for other states, by giving a new effect to such judgments.

Yet it is to be remembered, that in *McElmoyle vs. Cohen*, 13 Peters, 312, it had been settled that a state might, by statute, regulate and abridge the limitation of time for bringing suit upon a judgment of another state, and in every way completely control *the remedy*.

The interpretation which Mr. Justice Johnson feared might be deduced from the judgment in *Mills vs. Duryee*, has been contended for in most of the states, though generally without success. Indeed, in some cases, it would seem to have been supposed that a judgment was made, by the Act of Congress, of *greater* force in other states than in the state where it was rendered, notwithstanding the express declaration of the Supreme Court, in *McElmoyle vs. Cohen*, 13 Peters, 312, that such judgments "are conclusive upon the defendant in every state, *except for such causes as would be sufficient to set aside the judgments in the courts of the states in which it was rendered.*"

The Supreme Court of New York, as early as 1818, gave the proper construction to the decision in *Mills vs. Duryee*, in *Borden vs. Fitch*, 15 J. R. 143, in which it was held that a record of a decree of divorce, obtained in Vermont, might be avoided by proof that the court had no jurisdiction of the person of the defendant; and might also be impeached as obtained by *fraud*, because that would impeach the judgment in Vermont (citing *Fermor's case*, 3

Rep., 77). The elaborate opinion of Thompson, J., in this case, will be found to have anticipated the decision in *D'Arcy vs. Ketchum*. Story Conf. Laws, § 609, also instances *fraud* as a defence, not excluded by the Constitution and Act of Congress.

An interesting case has been determined in Connecticut (*Pearce vs. Olney*, 20 Conn. R. 544), which arose upon a bill in equity, filed by Pearce to restrain Olney from suing upon a judgment obtained in the Superior Court of the City of New York, upon personal service of process upon Pearce, but which he was induced not to defend, upon the misrepresentation of Olney, that the suit was commenced by mistake against him instead of against his principal (the real person liable), and should be discontinued.

It was earnestly contended that no relief could be given in Connecticut against the New York judgment without a violation of the constitution and the Act of Congress; but the Supreme Court of Errors of Connecticut held, that it could give the same relief that a Court of Equity could give in New York against the judgment as obtained by fraud and imposition; and decreed that the judgment was so obtained and perpetually enjoined any action upon it.

The New York judgment was afterwards sued in New York, and the case is reported as *Dobson vs. Pearce*, 1 Duer Superior Court Reports, p. 143. The defendant, (under the New York Code, allowing equitable as well as legal claims and defences in the same action,) pleaded the Connecticut decree in bar. And the court held it was a bar as proving that the judgment had been fraudulently recovered without further evidence. Mr. Justice Paine, one of the judges, dissented on the grounds that the Connecticut decree ought to be construed only as enjoining suit in Connecticut; also that the defence ought to have been made by a cross suit to avoid the judgment; and lastly, on the notion that the constitution and Act of Congress had been disregarded by the Connecticut Court, his opinion being founded on the assumption that the Act of Congress gave a force to the judgment in Connecticut, which it had not in New York, or rather that all remedy was confined to the court of the State where the judgment was rendered, which amounts

to saying in most cases that there is to be no remedy whatever.

He also says that the Connecticut decree might be overhauled in the same manner; which is true when properly understood, i. e. it might be, *if obtained by a like fraud.*<sup>1</sup>

D.

## RECENT AMERICAN DECISIONS.

*Supreme Court of Pennsylvania, at Nisi Prius, December, 1854.*<sup>2</sup>

WILLIAM THOMAS vs. JAMES CROSSIN, ET AL.

1. The 7th section of the Act of Congress, of 2d March, 1833, commonly called "The Force Bill," which authorizes the writ of *habeas corpus* to be issued by the courts of the United States, under certain circumstances, for the protection of officers, and others acting with them, in execution of the laws of the United States, is to be confined in its application to cases, where there has been an avowed purpose, by some authority or law of a state, to disregard an act of Congress, and to imprison or otherwise punish the officers of the United States for enforcing it; and operates, moreover, only in cases where such purpose appears on the face of the proceedings. Where a *habeas corpus* has been issued in pursuance of the statute, by a United States Court, it has no right to go behind the return to the writ; and if it does, and discharges the relator, upon evidence taken at the hearing, such discharge is inoperative, and will be disregarded by a state court.
2. The marshal and deputy marshals of the C. C. for the Eastern District of Pennsylvania, were arrested under a *capias*, in a civil action of assault and battery, for abuse of power, brought in the Supreme Court of Pennsylvania. They took out a *habeas corpus* to the Circuit Court. On the hearing, evidence as to the real cause of action in the suit was entered into, and the relators discharged. The sheriff returned these facts to the *capias*. An attachment was applied for by the plaintiff against the sheriff, for not bringing in the bodies of the defendants. The court held that the discharge by the United States Court was invalid, but refused the attachment under the circumstances, the plaintiff having unnecessarily delayed his application. It was decided, however, that the defendants might be considered as discharged on common bail, and that the plaintiff might proceed regularly in his action.

<sup>1</sup> Since the above article was written, the Court of Appeals of the State of New York have affirmed the judgment of the Superior Court in *Dobson vs. Pearce*, (December Term, 1854,) upon Dobson's Appeal.

D.

<sup>2</sup> Before LEWIS, C. J., and WOODWARD, J.

This was an action of trespass, *vi et armis*, against Wynkoop, marshal, and Crossin, Jenkins and Keith, deputy marshals of the United States, for the Eastern District of Pennsylvania.

In order to the proper understanding of the case, which has been before the courts in several shapes before, it is necessary to state, briefly, the circumstances out of which it arose, and the nature of the previous proceedings.

In the fall of 1853, a warrant, under the Act of 1850, issued out of the Circuit Court of the United States for the Eastern District of Pennsylvania, for the arrest of a negro by the name of Bill Thomas, as a fugitive slave, which was placed in the hands of the marshal and deputy marshals, the defendants above named. An attempt was made by them to seize Thomas, in the town of Wilkesbarre. He resisted, and a violent contest ensued, in which, though very severely injured, he succeeded in escaping. It has been alleged that the officers behaved with great and unnecessary brutality on the occasion; but this has been denied, and the truth of the charge is not at present material. It is sufficient to state, that the affray caused much excitement in the neighborhood, and that a third person believing the officers to have abused their authority, applied for and obtained a warrant for their arrest, on a charge of assault and battery with intent to kill, under which they were arrested. The negro had by that time fled from the state. A *habeas corpus* was immediately taken out from the Circuit Court by the officers. On the hearing, Mr. Justice Grier admitted evidence of the real state of facts, and discharged the relators, under the Act of Congress of March 2, 1833, called the Force Bill.<sup>1</sup>

<sup>1</sup> This case will be found reported under the name of *ex parte* Jenkins, in 2 American Law Register, 144, and in 2 Wallace, Jr. Rep., 521. The charge was persisted in by the prosecutor, notwithstanding this discharge, and an indictment subsequently found against the defendants by the Grand Jury of Luzerne County, for riot and assault and battery with intent to kill. A bench warrant of outlawry was then issued by the Quarter Sessions, to the sheriff of Philadelphia County, under which the officers were again arrested. Another *habeas corpus* was issued out of the Circuit Court of the United States, and they were then discharged once more. 2 Wall. Jr. 539.

The present action was then brought by Thomas, or by his friends, in his name, against the officers, in the Supreme Court of the State. Two affidavits to hold to bail were filed, not by the plaintiff, but by other persons. According to the statement in Mr. Wallace's report,<sup>1</sup> these affidavits "showed that on the day of the arrest of Thomas, he came out of a hotel in Wilkesbarre, wounded, bleeding, and faint—that he was pursued—that there was a cry of 'shoot him,' and the sound of pistol shots—that he made his way to the river, and plunged in, declaring that he 'never would be taken'—that he subsequently came out, but was driven back again, at the water's edge, by a presented pistol—that there were many persons on the river bank, some of whom were menacing, and some who are spoken of (in the affidavits) as the 'pursuers,' and 'the officers'—that among the persons on the bank were three, of whom one witness says he 'saw two in the court-room, one was Wynkoop, and the other a big man' he thinks 'was Crossin,'—and that soon after the return of the officers to the hotel, the fugitive having escaped in the meantime, a colloquy of an excited character took place between two gentlemen at the hotel, in which one of them announced himself as Judge Collins, and the other as 'John Jenkins, U. S. Deputy Marshal.' Nothing, however, was said about *Keith*, the fourth party now arrested." On these affidavits a *capias* was allowed by a Judge of the Supreme Court, with bail in the sum of \$3,000. The defendants were arrested, and not giving bail, were committed to prison. A *habeas corpus* was again sued out by them, from the Circuit Court of the United States, and heard before his honor, Judge Kane, the District Judge. Under the decision of Mr. Justice Grier, in the previous case, and on the ground of the uncertainty and insufficiency of the affidavits, the learned judge discharged the relators. The Sheriff returned these facts to the writ of *capias*.

After the lapse of about nine months, a motion was now made in the Supreme Court of Pennsylvania, at *Nisi Prius*, for an attachment against the sheriff of Philadelphia County, on the ground of an insufficient return, and for a failure to bring in the bodies of the

<sup>1</sup> 2 Wallace, Jr., 581.



defendants. The question was argued before their honors, Chief Justice Lewis and Judge Woodward.

The opinion of the Court was delivered by

LEWIS, C. J.—On the 31st of January, 1854, a *capias* issued out of this Court, in an action of trespass *vi et armis* for assault and battery, in which bail was ordered by Mr. Justice Woodward, in the sum of \$5,000. The writ was returnable on the first Monday in February, 1854. The defendants named in the writ were arrested by the sheriff, and on the 6th day of February, 1854, that officer was served with a writ of habeas corpus, purporting to have issued out of the Circuit Court of the United States, commanding him to bring the bodies of the prisoners, together with the cause of detainer, before “the honorable John K. Kane, one of the judges of the said Circuit Court.” On the 14th February, 1854, the said Circuit Court of the United States, having the bodies of the prisoners before it, together with the cause of detainer, duly certified, (to wit, the writ of *capias* issued out of the Supreme Court of Pennsylvania,) proceeded to hear evidence, and after said hearing, decided that the said prisoners were “under confinement and restrained of their liberty by authority of Samuel Allen, high sheriff of the County of Philadelphia, for acts done by them in pursuance of a law of the United States and of process issuing from a judge thereof;” and thereupon the Circuit Court of the United States ordered the prisoners to be discharged from confinement. The sheriff obeyed this order, and made return of the facts to this Court. On the 14th November, 1854, nine months after the prisoners were discharged, the plaintiff obtained the present rule on the sheriff to show cause why an attachment should not issue against him for want of a sufficient return to the original writ.

Was the sheriff bound to obey the order made by the Circuit Court of the United States? The answer to this question depends upon another: Had the Circuit Court jurisdiction over the parties and the question in the manner in which it was exercised? In considering a question of this kind, it should not be forgotten that the States of this Union are separate, free and independent sovereign-

ties, in all particulars, except those over which they have voluntarily given the control to the government of the United States; that the States are, in general, unlimited in their authority, while the United States government is one of *limited* and *enumerated* powers, and is strictly confined to the exercise of the powers thus enumerated. This fundamental principle of the Union is distinctly stated in the Federal Constitution itself. After enumerating the powers granted to the United States, the Constitution proceeds to declare that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." It is upon this principle of State sovereignty that each State has an undoubted right to regulate its own domestic institutions according to its own wisdom, and that neither its sister States, nor the Congress of the United States, have any right to interfere with such regulation.

The Constitution of the United States went into operation in March, 1789. In September following, the first Congress under it passed the "act to establish the Judicial Courts of the United States." In that act the section which gave the Federal Courts power to issue writs of habeas corpus, contained a *proviso* that those writs "shall in no case extend to prisoners in jail, unless where they are in custody, *under or by color of authority of the United States*, or are committed *for trial before some Court of the same*, or are necessary to be brought into Court to testify." This act was in conformity to the principles of the Union, and was passed when the discussions on the distribution of powers were fresh in the public recollection, and the subject was well understood by all. There was a manifest determination to guard the rights of the States, and to prohibit the Judges of the Federal tribunals from coming into collision with the State Courts, by any attempt to discharge prisoners who were held in custody under State process and State laws. In accordance with this principle, it was decided in *Cabrera's case* that the Circuit Court of the United States could not on habeas corpus discharge even a foreign Secretary of Legation from State process. 1 W. C. C. 232. And in *Dorr's case*, in 1845, it was held by the Supreme Court of the United States, that no

Court or Judge of the United States "can issue a habeas corpus to bring up a prisoner who is in custody under sentence or execution of a State Court, for any other purpose than to be a witness," and that "it is immaterial whether the imprisonment be under civil or criminal process," and that even "an individual who may be indicted in a Circuit Court of the United States, for treason against the United States, is beyond the power of the Federal Courts and Judges, *if he be in custody under the authority of a State.*" *Ex-parte Dorr*, 3 Howard, 105.

But the act of 2d March, 1853, sec. 7, gives the United States Judges powers somewhat more extensive than those previously exercised. By that section "either of the justices of the Supreme Court, or a judge of any District Court of the United States, shall have power to grant writs of *habeas corpus* in all cases of a prisoner or prisoners in jail or confinement, on or by any authority or law, *for any act done or omitted to be done, in pursuance of a law of the United States, or any order, process or decree of any judge or court thereof.*" Now it is exceedingly clear that there is a great difference between imprisonment *for an act done in obedience to the authority of the United States*, and being held to bail in an action of trespass *for an assault and battery committed without such authority*. The defendants in this action were in the latter predicament; there was nothing in the nature of the action, nor in the form of the writ, nor in the affidavits presented to the judge who fixed the amount of bail, which contained the slightest indication that they were sued for "any act done, or omitted to be done, in pursuance of any law of the United States, or any order, process or decree of any judge or court thereof." No State law had been passed authorizing such imprisonment. No judicial action had taken place in any manner countenancing such opposition to the authority of the United States. On the contrary, a large majority of the people of this State, and all the departments of the State government, stood in the most perfect fealty to the Constitution and laws of the United States. Neither at the time the act of 1833 was passed, nor at the time of the recent action of the United States Circuit Court, under its supposed authority, was there any reason

to believe that any officer of the United States Government, or other person, would or could be imprisoned by authority of this State for acts done under the authority of the United States. So far from this being the case, the State authorities constantly recognized all the constitutional powers of the United States; and the law of the United States would have been recognized in the State judiciary as a justification for any act done in pursuance of them, as fully as any Court of the United States had a right to recognize them. Under these circumstances, has the act of Congress of 1833 any application to the present case? The words of the act do not embrace it. They are confined to imprisonment for acts done or committed *under the authority of the United States*. The action and imprisonment in this case was for an *assault and battery without authority of any law whatever*. But it is conceded that a statute must be expounded, not according to its *letter*, but according to its *meaning*, and that even a thing which is within the *letter* of a statute is not within the statute unless it be within the *intention* of the makers, 11 Rep. 73; Bac. Ab. tit. Statute 1; Dwarris on Statutes, 690, 691, 692. It is an established rule of construction, that "the intention of the law-maker and the meaning of the law are to be discovered and deduced from a view of the *whole and every part of a statute taken and compared together*. It is the most natural and genuine exposition of a statute, to construe one part by any other part of the same statute; for that best expresses the meaning of the maker, and such construction is *ex viceribus actus*." 1 Inst. 381; Dwarris, 698. "The words and meaning of one part of a statute frequently lead to the sense of another, and in the construction of one part of a statute every other part ought to be taken into consideration." Stowel vs. Zouch, Plowden, 365; 2 Inst. 310; Dwarris, 698. It is also a rule equally well established, that the "old law and the mischief," or, what is the same thing, "the occasion and the reason of the enactment," are to be considered in ascertaining its meaning. Dwarris 702. With these rules before us, let us examine the several provisions of the act of Congress of 2d March, 1833, and let us look also into "the occasion and the reason of the enactment."

It is well known that the people of the United States have been divided in opinion in regard to the power of Congress to lay duties and imposts on foreign importations for the protection of domestic manufactures. The power to lay these duties for the purpose of raising revenue for the support of government was not doubted ; but a large portion of the people denied the power to lay them "for the purpose of giving bounties to classes and individuals engaged in particular employments at the expense and to the injury and oppression of other classes and individuals." One of the Southern States, South Carolina, carried its opposition so far as to assemble in convention and to pass an ordinance, on the 24th of November, 1832, expressly declaring "the laws for imposing duties and imposts on the importation of foreign commodities, especially the acts of Congress of 19th May, 1828, and 14th July, 1832, to be null, void, and no law, nor binding upon the State, its officers and citizens." The ordinance further declared that "it shall not be lawful for any of the constituted authorities of the United States to enforce the payment of duties imposed by the said acts within the limits of the State," and made it the duty of the Legislature to "adopt such measures and pass such acts as may be necessary to give full effect to this ordinance, and to prevent the enforcement, and arrest the operation of the said acts of Congress within the said State." On the 20th December, 1832, the Legislature of South Carolina, in obedience to this direction, actually passed an act to carry into effect this ordinance of nullification. It authorized writs of *habeas corpus* to relieve from imprisonment, writs of *replevin* to retake property seized, and other actions to recover back money collected, and to recover damages for injuries incurred, *under the said acts of Congress imposing duties on foreign imports.* It declared all sales of property under judgments in the United States Courts, *for the said duties*, null and void, and prohibited the clerks of the State courts from furnishing copies of any judgment of a State court, *where the validity of the said acts of Congress was drawn in question*, to any person, for the purpose of reviewing the same in the United States Courts. It authorized the Sheriff to resist any attempt of the United States officers to recapture property

*under pretence of the said acts of Congress, and punished by fine and imprisonment any United States officers, or others, who should disobey, obstruct or resist the process allowed by the nullification act, or should cloign, secrete, or wilfully remove any property seized for said duties, or do any other act to prevent the same from being replevied by the State process, or should, after the same had been replevied, recapture or seize, or attempt to recapture or seize the same, "under pretence of securing the duties imposed by any of the several acts of Congress aforesaid, or for the non-payment of any such duties, or under any process, order or decree, or other pretext, contrary to the ordinance aforesaid."* It prohibited the use of the public jails, or the letting to hire of any private building as a jail, for the purpose of imprisoning any one *under the said acts of Congress.*

Here was an open nullification of certain acts of Congress—an avowed intention to resist them—a denial of the right of appeal to the Supreme Court of the United States—and a determination to punish by fine and imprisonment any officer of the United States, or any person who aided him *in the performance of his duty under such acts of Congress.* The offence, as described in the statute of nullification, was *acting in obedience to the acts of Congress for the imposition of duties on foreign imports.* The warrant of arrest and the indictment would necessarily, in all cases, describe the offence as it was described in the statute creating it, and would, therefore, *show upon their face* that the imprisonment was "*for an act done, or omitted to be done, under a law of the United States.*"

To relieve against such an imprisonment required no trial by jury, for no facts could be in dispute. The whole case was resolved into a pure question of law, whether a State had the power to nullify an act of Congress. In view of these circumstances, and for the purpose of counteracting these proceedings of the State of South Carolina, the act of Congress of the 2d March, 1833, commonly called "*the Force Bill,*" was passed. It directed the custom-houses to be kept in some secure place, either on land, or on board any vessel. It authorized the employment of the army and navy, and the militia of the United States, to protect and aid the custom-house

officers and others in the collection of the said duties. It gave the Circuit Courts of the United States jurisdiction of all suits against the United States officers, and others who aided them in the collection of the revenue, and authorized the removal of such suits from the State Courts into the United States Courts for trial. It authorized suits in the United States Courts for the recovery of damages for any injury done to them for the performance of their duties under the revenue laws. It declared all property seized for duties to be irrepleviable, and it punished by fine and imprisonment any person who should rescue, or attempt to rescue, any property taken to enforce the payment of the said duties. It provided for supplying by secondary evidence the records of the State Courts where the copies thereof could not otherwise be obtained; and where the public jails and private houses were not allowed to be used as places of imprisonment to enforce the payment of duties, it authorized the marshal to use other convenient places.

After these provisions, all of which were plainly intended to counteract and provide for the exigencies created by the act of nullification, the seventh section followed, giving to the United States Judges the powers in respect to writs of habeas corpus, which are now the subject of consideration in this case. It is impossible to look into the history of the country without seeing that this section was intended specially to remedy the evils caused by the nullification of South Carolina. It is equally impossible to read the enactments of that State, in relation to the revenue laws of the United States, and compare them with the provisions of the act of 2d March, 1833, without perceiving that the special object of the latter was to counteract the former, and that the general purpose and language of the act of Congress was confined to that object alone. It cannot, therefore, by any known rule in expounding statutes, be carried by construction to matters not within the letter nor spirit of the act, nor within the mischief to be remedied. It must be confined to cases where there is an *avowed purpose*, by some authority or law of a State, to disregard an act of Congress, and to imprison or otherwise punish the officers of the United States and their assistants, for enforcing it, and operates only in cases where this purpose



*appears on the face of the proceedings.* No authority was given to the United States judges to go behind the cause of detainer returned on the writ of habeas corpus, and to investigate and try questions of *fact* without the intervention of a jury, or to adjudge that the cause of detainer was *other than that which appeared on the face of the return.* No such extraordinary power was called for by the exigency of the case, and therefore, no such authority was given by the act. It was far otherwise in the celebrated case of Alexander McLeod. He was indicted for murder, committed within the jurisdiction of the State of New York, (25 Wend. 483.) The British government avowed the act complained of, and demanded his discharge. By the law of nations, the command of the sovereign is a justification for any act which the sovereign himself, according to the same law, has a right to commit. But it did not appear *upon the face of the proceedings* either that the act was authorized by the British government, or that the entry into a neutral territory, by an armed band of men, in the secrecy of midnight, in a time of profound peace, and without any preliminary notice of hostility, or demand of redress for supposed injuries, and the destruction of property and assassination of citizens therein, was such an act as any government had a right to authorize, or could justify under the rules which now control the conduct of civilized nations.

As the federal authority is responsible to foreign governments for the proper decision of all such questions, it was deemed proper to give the federal courts jurisdiction over them; and therefore, in all cases where the subject of another nation is confined under authority of law for any act under the sanction of his sovereign, *the validity of which may depend upon the law of nations*, the act of Congress of 29th August, 1842, authorizes the United States judges to issue writs of *habeas corpus*, and, upon the return, to "hear the cause" and to receive proof of the justification relied upon. This power was deemed absolutely necessary, to enable the general government to meet its responsibilities to foreign nations, and to save the country from being involved in a war through the action of State authorities. But even in this extraordinary exigency, full provisions were made in the act for an appeal from the decision of the



judge on habeas corpus to the Supreme Court of the United States. But no such provisions are contained in the act of 1833. No authority is given to "hear the cause," nor to receive proofs apart from the cause of detainer returned. The difference between the two acts, and the diversity in the several occasions which produced them, plainly show that Congress intended that the powers granted by and the mode of action under them should also be different. In the one case the judges were confined to the cause of detainer returned, for the reason that this was all that was required to accomplish the object of the act. In the other, they were authorized to go behind the return, and to inquire into the facts and merits of the justification relied on; for nothing short of this would effectuate the manifest intention of the law, or meet the mischief designed to be remedied.

As no power is given by the act of 1833 to go behind the cause of detainer returned, the common law furnishes the rule for ascertaining the extent of the authority intended to be conferred by a grant of the right to issue writs of habeas corpus. "It seems to be agreed," says Hawkins, in his "Pleas of the Crown," "that no one can in any case controvert the truth of the return to a habeas corpus, or plead or suggest any matter repugnant to it;" 2 Hawkins, B. 2, ch. 15, s. 18; 2 Str. 851, ib. 1138; 1 Leach, 270; 4 Hayw. 165; 25 Wend. 569; 4 Dall. 413. There are, it is true, exceptions to this rule, under which a confession and avoidance has been allowed, and men who have been impressed into his Britannic Majesty's service, and were about to be carried into foreign parts, have been allowed to controvert the truth of the return, in order to prevent a total failure of the object of the writ. Fortunately for the security of our citizens, we have no such intolerable slavery here as that existing under the English law of impressment. There is, therefore, no occasion for an exception to the rule of law, in order to relieve any one who happens to be so fortunate as to be privileged from such an outrage. But Sir Michael Foster, in speaking of this rule and the exception to it, correctly declares that "exceptions do not destroy, but rather establish a general rule."

It is true, also, that statutes have been enacted in England, and

in the several States, giving to the Courts, in certain cases, the power to inquire into the facts and to controvert the truth of the return. These enactments serve to prove the rule of the common law. But there is a difference between controverting the *truth of the return* to a habeas corpus, and trying, or retrying, upon evidence, the merits of *the cause of detainer set forth in the return*. Even under the statute, it has been held that the latter cannot be done, "because it trenches on the office of the jury," 25 Wend. 569. But the *habeas corpus* acts of the several States can give no authority to the courts of the United States. If they did, it would be impossible to say which of the statutes of the several States must control; and it must be manifest that where the object of an act of Congress is to counteract the State laws, it would be altogether repugnant to the purpose of the act, and would tend to defeat its operation, to adopt the statutes of the refractory State as the rule of decision. In *Burr's trial*, Chief Justice Marshall, in speaking of writs of habeas corpus under the act of 1789, furnished the true construction of the act of 1833. He declared that the "principles and usages of law mean those general principles and usages which are to be found, *not in the legislative acts of any particular State*, but in that generally recognized and long established law which forms the substratum of the laws of every State." By this he means the Common Law. The act of Congress of 1833 must therefore be understood to confer upon the United States judges nothing more than the power to proceed on these writs, according to the rule of the common law. By that rule the judges had no right to controvert the truth of the return. But more especially were they prohibited from trying, without a jury, and without the means of reviewing their decision, the *facts and merits* of the cause of detainer set forth in the return.

But by the true construction of the act of 1833, it is confined to cases of imprisonment *for executing the revenue laws*. And even in those cases, it was not intended to discharge, without security for their appearance, persons who were arrested on mesne process, for the purpose of compelling them to give bail to an action. This is fairly to be inferred from the general provisions of the act. In

suits in the State courts for anything done under the revenue laws, ample provision is made in the act for the removal of those causes into the United States Courts for trial therein, *according to the course of the common law*, with a right of review in the tribunal of the last resort; and in the meantime, so far from discharging the persons in custody in such actions, without bail, the marshal is expressly directed by the act to *take the bodies of the defendants into his custody*, to be dealt with, *in the said cause, according to the rules of law*, and the order of the Circuit Court, or any judge thereof in vacation. And "all attachments made, and all bail and other security given upon such suits," are expressly directed to "continue in like force and effect as if the said suits had proceeded to final judgment and execution in the State court." There is no injustice in permitting the habeas corpus action to operate in cases of this kind, where ample provision is made to secure the prisoners in custody until bail is entered, and to hold the bail until the final decision is made. It deprives the parties of no rights. It merely changes the forum. But there is no provision for the removal of *other actions*, or for securing a trial therein, or for an appeal, or for holding the prisoners until bail be entered, or for continuing the liability of the bail until the final decision, so that if this section be construed to authorize the discharge of prisoners arrested for *other causes*, in the State courts, it operates as a complete denial of justice. It virtually arrests the proceedings in the State courts without providing a remedy elsewhere. It violates the great constitutional injunction that "every man for an injury done him shall have remedy by due course of law." It constitutes a subordinate judge the exclusive arbiter of questions of *fact* and *law*, contrary to the fundamental principle of the trial by jury: "Ad questiones facti non respondent iudices; ad questiones legis non respondent iuratores." It is impossible to believe that the national legislature intended any such violation of private rights, or disregard of fundamental principles. The whole history of the act in question, and all its provisions, are at variance with any such construction.

If a prisoner may be discharged from *mesne* process in this way, he may also be relieved from *final* process, by the same means.

The act of Congress is as operative in the last case as in the first. Indeed, it was manifestly intended to relieve against the final judgments in a State which punished public officers for performing their duties, and allowed of no appeal from its decisions. Without giving the act in operation upon imprisonment under final judgments of State Courts, it would fail of its great object, which was to relieve against open acts of nullification by State authority. If the act be extended to cases where no such intention appears, and be applied, as it must be, to final process, let us look at its operation. The plaintiff brings his action for an injury *not authorized by any law whatever*. The defendant alleges that the act *was authorized by a law of the United States*. The Constitution of the State declares that "the trial by jury shall be as heretofore, and the right thereof remain inviolate." The Constitution of the United States is equally emphatic in the provision that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any Court of the United States than according to the rules of the common law." The sum in controversy exceeds twenty dollars—the suit is a suit at common law. The parties accordingly go to trial before a jury, and the decision is solemnly pronounced, according to the rules of the common law, that the defendant *had no authority, under the act of Congress, to do the injury complained of*. The Constitution of the United States and the act of Congress of 1789, give the parties the right to review this decision in the Supreme Court of the United States by writ of error, where, if it be erroneous, the judgment would be reversed, and the cause sent back for a new trial before another jury. But according to the construction of the act of 1833, as now claimed in this case, all these proceedings are nugatory and void! A single judge of the District Court of the United States may, it is alleged, re-examine the merits—disregard the verdict and judgment—and, without a trial by jury, or right of appeal, may discharge the defendant from imprisonment under the execution. If this may be done, what becomes of the inestimable right of trial by jury? Of what avail is the solemn guaranty of that right contained in the

State Constitution? Of what force is even the express provision in its favor, as set forth in the Constitution of the United States? Of what consequence are the laws of the several States? Of what value is the process, or even the most solemn judgment of any State Court in the Union? Are all the independent States of this great confederacy to be trodden in the dust, at the foot of a single subordinate judge? The Congress of the United States is patriotic and enlightened, but its members are the free representatives of independent States. The national army and navy are irresistible in war, but its soldiers and sailors are the true-hearted citizens and sons of the several States. The Union is great and glorious indeed, but it is the creature of the States, and the stars that glitter on its banner represent the proud and powerful sovereignties from which it derives its existence, its support, and its lustre. When these are extinguished, the Union itself will be lost in the gloom of anarchy or despotism. This truth was beautifully expressed by the Chief Magistrate of the Union, when he declared it to be a duty of high obligation "to preserve sacred from all touch of usurpation, as the very palladium of our political salvation, the reserved rights of the States and the people."

The act of 1833 has been in existence more than twenty years. It was passed, as we have seen, for the special purpose of granting relief to the United States officers and their assistants, where a State undertook to imprison them *for executing the revenue laws of the United States*, and it was intended to apply only to cases in which that purpose was *openly avowed, and was set forth on the face of the cause of detainer itself*. From the day of its enactment to the time of making the recent orders of the Circuit Court, in the matters connected with the plaintiff's case, it has never been supposed to apply to any other purpose. No case has been produced to furnish a precedent for the action of the Circuit Court; and, so far as our knowledge extends, no such authority exists. If the act admitted of such extensive operation as that contended for in this case, there must have been very many opportunities for so applying it. In a government of such vast extent, and with officers so numerous, and engaged in such a variety of duties, it is not likely

that they have been more fortunate or circumspect than other citizens, in avoiding personal liability for violating the rights of others. They must, in the nature of things, have been as frequently called to account for their actions as other officers. If it had been supposed for a moment that they were above the law, and that they were not bound, like other citizens, to submit their pleas of justification to "the judgment of their peers," the Courts of the United States would have been flooded with applications for these convenient privileges. Those tribunals, like cities of refuge, would have been crowded with fugitives from the justice of every State in the Union.

The *habeas corpus*, in this case, was issued under the seal of the *Circuit Court* of the United States. It commanded the sheriff to bring the prisoners before "*one of the judges*" of that Court. The sheriff made his return "*to the judges*" of that Court, and the order for the discharge of the prisoners was made *by that Court, as a Court*, and not by a single "justice," or "judge." The authority to issue writs of *habeas corpus*, in the cases provided by that statute, is distinctly confined to "either of the justices of the *Supreme Court*, or a judge of any *District Court*." It is needless to say that a special authority like this must be strictly pursued, and that no "justice of the *Supreme Court*," nor "judge of the *District Court*," has any right to avoid or divide the solemn responsibility of the high and perilous trust reposed in him by the act. If he acts at all, it must be his *sole and separate* act, either as a "justice of the *Supreme Court*" or as a "judge of the *District Court*." He cannot fold himself up in the imposing mantle of the *Circuit Court*; for that Court, as a Court, has no jurisdiction whatever under the section supposed to sanction this order of discharge. It was manifestly intended, by the act of Congress, that when the rights of the States or the parties, are thus intefered with, they should know who directed it, and in what capacity he acted.

The United States stands in no need of means to enforce her laws. Her Supreme Court claims and exercises jurisdiction by writ of error over the judgments of the Courts of the last resort in the several States, *in all cases where a right has been claimed*

*under the laws of the Union, and that right has been denied.* Their jurisdiction is claimed and exercised in civil as well as criminal cases ; so that there was no necessity whatever for a resort to the indignity of obstructing State process, and contemning State authority, in the manner attempted in this case. It is impossible to believe that the representatives of free States ever intended to authorize any such unnecessary infringement of the reserved rights of the States and the people. Neither the words of the section relied on, nor the general provisions of the act, nor the occasion which called it into existence, nor the general rules of the common law by which it must be expounded, nor any usage under it, nor any other circumstances of propriety or necessity, indicate any such intention. We are, therefore, of opinion, that the Circuit Court of the United States had no jurisdiction whatever over the parties in this cause, and had no authority to interfere with the execution of the process of this Court. When a Court of limited jurisdiction, instituted by a government of enumerated powers, transcends its authority, its order is no justification to the officer who obeys it. In this case the sheriff ought not to have obeyed the order for the discharge of the prisoners.

In giving this opinion, there is not the slightest feeling of disrespect for the learning and integrity of the judges of the Circuit Court. On the contrary, we can appreciate the feeling and excuse the errors of a judgment likely to be excited by the disorderly movements of a class of individuals, who, setting up their own judgments as a "higher law" than the Constitution, are constantly endeavoring to defeat the operation of certain laws of the United States. But these considerations do not absolve us from the discharge of our official obligations. We might have stepped out of our way to avoid this question for the present. But it lies directly in our path, and it must be met in this cause, should the plaintiff proceed by action against the Sheriff, or recover in this suit. To avoid it would be to countenance encroachment, and would leave the Sheriff, and other officers charged with the execution of the laws of the State, in doubts in regard to their official duties. It is better that our opinion should be made known at once, in order that



the State officers may know their duty, on the one side, while on the other, those who may feel themselves authorized to obstruct hereafter the regular and valid process of this Court, without authority, may act with a proper consideration of their responsibilities.

It does not, however, necessarily follow from these views, that we are bound to commit the sheriff for a contempt of this Court. This remedy is under the discretion of this Court, and is the appropriate one where there is a *corrupt* or *wilful* disobedience of the commands of the writ; but "where there is neither *corruption*, nor any particular *obstinacy* in relation to the service of such writ, nor other extraordinary circumstances of *wilful negligence*, the judgment whereof is left to the discretion of the Court, it is not usual to grant an attachment; but the party is left to his ordinary remedy by action against the officer, or by taking out an *alias* and *pluries* which, if the sheriff do not execute, an attachment goes against him," of course, unless he give a good excuse for his conduct. 2 Hawk, P. C. b. 2, ch. 22, s. 2. If the plaintiff has not moved for an attachment in a reasonable time, it will not be granted. The party will in that case be left to his ordinary remedy by action or otherwise. *Rex vs. Pering*, 3 B. & P. 151; *Rex vs. Sheriff of Surry*, 9 East, 467; Watson on Sheriffs, 122. In this case there is not the slightest evidence of *wilful* misconduct on the part of the sheriff. It was natural that that excellent officer should respect the authority of the Circuit Court. The order for the discharge of the prisoners came to him in the imposing form of a judicial act, and when all the circumstances are considered, it is not surprising that he obeyed it. It does not appear that the plaintiff gave any notice that he would contest its validity, or would hold the sheriff liable if he regarded it. On the contrary, the plaintiff silently acquiesced in the discharge from the 14th of February to the 14th November, 1854, a period of nine months. Under these circumstances it would be unjust to the sheriff to award an attachment. The defendants may be considered as discharged on common bail, and the plaintiff may proceed in his action. Should he recover, the powers of this Court to enforce the execution of the judgment



will be called into action. But the present rule must be discharged.

Mr. Justice Knox, who was present at the argument, fully concurs in this opinion.

Rule discharged.

NOTE.—The following is the opinion delivered by his Honor Judge Kane, on the discharge of the defendants in this case, as reported in 2 Wallace, jr. 533:

KANE, J.—The seventh section of the Act of Congress, of March 2d, 1833, chapter 57, under which the action of the court in the present instance is to be regulated, enacts, “That either of the Justices of the Supreme Court, or a Judge of the District Court, shall have power to grant writs of habeas corpus in all cases of prisoners in confinement, where they shall be confined by any authority of law for any act done in pursuance of a law of the United States, or any process of a judge or court thereof.”

I will not weaken by a repetition, that clear and conclusive exposition of this section, given by Judge Grier, when this case was before us on the arrest, at the suit of the Commonwealth, for the assault and battery with intent to kill. But to say that we may issue a habeas corpus to rescue an officer from imprisonment for doing his duty, and yet that we shall shut our eyes to the proofs that he did it—to affirm that a court, called on to inquire whether an imprisonment is tortious, must listen to no evidence but that of the tortfeasor himself and that of his accomplices—to protest that wrong is to be done by truth pertinent to the issue—is to invert the first principles of common sense as well as justice.

What is that issue? Is it whether the learned Judge of the Supreme Court of Pennsylvania had authority to issue this writ: or whether this writ itself is formal? No one has contested either of these positions. Is it whether he has exercised his functions properly? It is no part of my functions to revise his adjudications; he has his own sphere, and I do not share its responsibilities. He was called upon to sanction the arrest of trespassers. Affidavits which he regarded as sufficient, were laid before him, and he granted the arrest. I am called upon to relieve an officer of the United States from a false and tortious imprisonment. He had to decide, I suppose, whether the party who complained before him had a right to the process he sought; he has decided that question. I have to inquire whether under any supposed cover of that process, the laws of the United States have been violated in the imprisonment of their officers, and this question I am going to decide.

And how do the learned counsel ask me to prepare for my decision? Because the judge of a State Court, in a proceeding necessarily *ex parte*, may have been imposed on by misstatements or suppressions of fact, am I therefore constrained in another cause, under another law, within a different constitutional jurisdiction, to make my hearing *ex parte* also; to hearken only to him, who has abused, it is said,

the process of the law by falsehood or fraud, and refuse my ear to him whom the law specially enjoins me to relieve, if he has been wronged?

What is to be the consequence? A man swears to an assault and battery; the entire truth told, he was arrested for robbing the mint or the mail. Another swears to a trespass in breaking his close and carrying away his goods; the goods were stolen, and have been recovered under a search warrant. Both affidavits are the truth, unless that means the whole truth; they make out the *prima facie* case of the plaintiff. What then? Is the officer to go to prison in default of bail, and to stay there because the rogue swore to only half the story? Or would the argument change if the plaintiff should substitute another man's oath for his own, keeping himself aloof the while, not caring to proclaim his whereabouts?

But this is not to meet the question before me in all its breadth. He who has read the Act of Congress, of March 2d, 1883, or who remembers the times to meet which it was passed, knows perfectly well that it looked to the contingency of a collision between the general and the state authorities. There were statesmen then, who imagined it possible that a statute of the United States might be so obnoxious in a particular region, or to a particular state, as that the local functionaries would refuse to obey it, and would interfere with the officers who were charged to give it force, even by arresting and imprisoning them. In direct antecedence, therefore, to the section under consideration, they framed two other sections of the same statute, one authorizing the military forces of the United States, to be employed in aid of the judicial power, the other authorizing a resort to especial jails for the safe keeping of United States prisoners. It was necessary to go one step further. The military power might enforce the execution of the laws, when the marshal had failed and been made a prisoner himself for attempting to execute them; the prisons specially constituted might detain those whom the military had arrested; but the officer of the law, arrested in the discharge of his duty, imprisoned for the offence of attempting to discharge it, perhaps at the suit of the resisting state, more probably at the instance of some private grief, what was to become of him?

This seventh section meets the case, and gives the remedy. Is it credible that wise men, framing a statute for such an emergency, meant to deny to their judges to hear the wrong before they adjudicated the redress; or to draw upon the consciences of the men who had instigated the outrage on the officers, and to accept the recorded formalities, by which the outrage had been consummated, as the only reliable and legal means for ascertaining facts and legitimate deductions from them?

It is not to be questioned, that there have been men in some quarters of the country, whose efforts, if successful, would have made this section as applicable in spirit, as it is in terms, to cases under the fugitive slave law; and I do not see the circumstances which at the present moment should make its reasonable construction, and the proper mode of giving it effect, different.

The whole course of the argument goes to show, that the section applies alike to all cases in which an officer is imprisoned, because of acts done in pursuance of the United States laws. It is altogether *a fortiori* that the relief must extend to cases of arrest under civil process. The suit of an individual has no claims to superior

dignity or consideration over a prosecution instituted by the State; nor is it generally as well considered, or as rightful.

I pass over the argument, which supposes that I am about to try this cause between the parties to the exclusion of the jury. It is simply founded in mistake. I can neither acquit or convict. Nor can my action arrest the proceedings in the State Court, nor have any effect on the trial there. The Act of Congress, which gives to revenue officers the right to bring themselves for trial into the Circuit Court, when their official conduct is in question, does not extend to the officers of the law.

If, therefore, there was such a case made out *ex parte* by Thomas, and such as, *prima facie* and on his affidavits, showed an abuse of authority by the officers, I should hear the evidence which they wished to offer to repel it. But it is not necessary for me to do this, for there is in truth nothing in them which sufficiently connects any of the United States officers with the acts of violence of which Thomas complains.

There is nothing in them to show by whom he was wounded, nor in what manner, nor under what provocation, nor with what attending circumstances, nor who pursued, or menaced, or cried "shoot him," or fired or presented pistols. The relators are in nowise connected with any of these incidents, except that two of them are doubtfully and imperfectly referred to as having witnessed the scene near the river bank, and a third as having, a little while after the affair was over, given his name to a gentleman who inquired for it. As to Keith, the fourth named defendant in the writ of *capias*, he is neither named, nor described, nor alluded to.

And beyond this there is nothing before me. The plaintiff himself who could have sworn clearly and affirmatively to all the merits of his case, had made no affidavit. He could have told us how it came to pass that he was wounded, and whether he was the aggrieved or the aggressor in the affray. If he was not in fact the fugitive named in the warrant, and resolutely periled his own life by assailing the lives of those who were charged to apprehend him—or if they transcended their authority, and he was beaten without cause; his affidavit might have possessed us of it all, without a recourse to inference or rumor. He too could have identified the parties that beat, or shot, or menaced him.

What others have sworn to, not only fails to implicate the relators in any act of violence whatever, but it leaves it absolutely to be guessed at, whether the plaintiff has been wronged at all. I cannot but wish that his personal affidavit had been found with the rest. He is absent; but he has constituted and instructed counsel, and I am justified in assuming that they have not failed to apprise him that his own statement, under oath, was the usual, and might be, perhaps, the indispensable condition of success in his application to imprison the relators.

I have already had occasion to observe, that in a case arising under this statute, I cannot feel myself restricted by the practice that governs applications for bailable process. But I think it safe to avail myself of the light which that practice reflects

"No plaintiff," says Judge Sergeant, in the case of *Nevins v. Merrie*, 2 Wharton 500, "can be considered entitled to demand bail for a cause of action which he can

neither positively swear to, nor allege sufficient facts and circumstances in the affidavit to satisfy the judge of its existence." Equally safe, it seems to me, would be the rule, that an officer of this court should not be detained in prison for an alleged abuse of his powers, without either a positive oath of merits from the plaintiff, or a sworn detail of circumstances to supply its place.

*Relators discharged.*

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*In the District Court of the United States for the Wisconsin District, November Term, 1854.*

CHARLES A. AVERY AND MOSES K. MOODY vs. EDGAR P. DOANE.

1. A married woman living with her husband, having carried on business of trade in her own name, and purchased goods upon credit, and also having a running account for goods purchased of her husband, cannot be proceeded against as garnishee in an attachment against her husband.
2. The act of Wisconsin to provide for the protection of married women in the enjoyment of their own property, does not enable a married woman, while living with her husband, to carry on trade to the exclusion of him or his creditors, or to become his debtor in the business of the trade.

The opinion of the Court was delivered by

MILLER, J.—This proceeding was commenced by writ of attachment, which was served on Sarah A. Doane, as garnishee. Her answer was taken before a commissioner of this court; wherein she states, that she is the wife of the defendant, Edgar P. Doane, and has been for eighteen years, and that she resides with her husband, at Green Bay; where she is, and has been engaged in the dry goods, millinery and fancy goods business, for four years. That she carries on the business, and buys goods in New York and Chicago, in her own name, principally on credit. She also bought goods on credit out of her husband's store, before he sold out and stopped business. She had a running account with her husband. When she commenced business at Green Bay, her father purchased part of the goods, amounting to four or five hundred dollars; and gave her some money as a present. Her business has always been in her

own hands; and she now gives her husband his board for his assistance and services.

The plaintiff's counsel not being satisfied with the answer of Sarah A. Doane, of which the foregoing is in substance a part, moved the court to order an issue, to try her liability as garnishee, under the statute; which motion is opposed by her counsel, upon the ground, that being the wife of the defendant in the attachment suit, she is not answerable in this proceeding, under the circumstances disclosed in her answer.

There is no law in this State recognizing the custom of London, whereby married women may carry on the business of trade and merchandise as *femmes sole*, while cohabiting with their husbands. In some States *femmes covert* may carry on business as *femmes sole*, in pursuance of statutes, while their husbands are engaged as mariners and absent from the country. This is the extent of legislation upon this subject, in any of the States, within my knowledge.

It is unnecessary to refer to authorities to prove, that, at common law, the husband is entitled to the goods and chattels of the wife, and also to all sums of money which she earns by her own skill and labor; and that these he has absolutely in his own right and not in hers. And if she purchases goods or property, during coverture, with his assent, and with the proceeds of her labor and saving, they become his at the moment of the purchase, and he becomes responsible for such as may be purchased upon credit.

It is contended that the act to provide for the protection of married women in the enjoyment of their own property, approved February 1, 1850, chap. 44, changes the common law upon this subject. The third section of the act is as follows: "Any married female may receive, by inheritance or by gift, grant, devise or bequest, from any person other than her husband, and hold to her own and separate use, and convey and devise, real and personal property, and any interest or estate therein, and the rents, issues and profits, in the same manner and with like effect as if she were unmarried, and the same shall not be subject to the disposal of her husband nor be liable for his debts." The act provides more effectually for the protection of the wife's property, by dispensing with the neces-

sary intervention of trustees, than Courts of Equity had done; but it does not authorize the wife to hold to her own use, to the exclusion of her husband or his creditors, a store of goods purchased by her upon credit, or the profits or proceeds of trade. By the act, she might have held, to their exclusion, the money given her by her father, but nothing more. That was property given her by a person other than her husband, which she, by the act, could receive, and not be subject to the disposal of her husband nor liable for his debts. The goods now in the store, and the notes, accounts, and cash in hand she did not receive by inheritance, gift, grant, devise, or bequest, from any person other than her husband, or in any way known to this act.

The act changes materially the legal incidents of the marriage relation, but it has not extinguished quite all of the marital rights of the husband. He is still entitled to the person and labor of his wife, and to the benefits of her industry and economy. The wife, by the act, is not degraded to the condition of a hireling, which she would be if it authorized her to withhold from her husband the proceeds of her own labor; nor is she vested with authority over him, or of independence of him, in her business transactions of trade, even if he, as in this instance, after disposing of his goods without paying his debts, should consent to become her servant for his board. The defendant, by voluntarily surrendering to his wife his marital authority in the control and direction of the business of his family, cannot compromise the legal rights of his creditors. He may consent to serve his wife in the store for his board, but the law entitles him and his creditors to the goods and the proceeds of sales. The persons from whom she purchased goods upon credit, with her husband's consent, cannot bring suit against her, but must resort to him for the recovery of their demands, although the charges in their books may be to her, or the notes be signed by her alone. As she cannot contract in business of trade in her own name while living with her husband, she cannot sue or be sued in her own name upon transactions connected with the trade, nor be summoned as his garnishee. She can no more be his debtor, in this particular, than she can hold the goods in store or the avails of sales, to the exclu-

sion of him or his creditor. The common law has wisely ordered that property acquired by the wife by purchase, with the consent of her husband, is in his possession and under his control, and the act under consideration does not disturb this provision, so essential to the peace and happiness of families.

The act of this State is copied from that of the State of New York; where a similar decision was made in *Lovett vs. Robinson and Witbeck*, 7 Howard's Prac. Rep. 105. And a similar decision of the Supreme Court of Pennsylvania, upon a similar law, is reported in *Raybold vs. Raybold*, 8 Harris' Rep. 308. In that case it is decided that, the fact that real estate was paid for with the wife's earnings and savings, does not give her a trust estate in the property; but that money thus acquired is not the property of the wife, within the meaning of the act, relating to the estate of married women, but is the property of her husband.

For these reasons the proceeding against Sarah A. Doane, is dismissed, and the application for an issue is overruled.

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*In the District Court of the United States for the Maryland District, January, 1855.*

CHARLES REEDER, JR. vs. THE STEAMSHIP GEORGE'S CREEK.

1. Construction of the act of 29th July, 1850, relating to conveyance of vessels.
2. A recorded mortgage of a vessel does not take priority over a subsequent lien, obtained by a material man, for necessary supplies or repairs.

Libel *in rem* by a material man, for repairs to the ship.

The opinion of the Court was delivered by

GILES, J.—This case has been argued and submitted to the Court upon the following statement of facts:

The steamer "George's Creek" belongs to the port of New York, and on the 24th December, 1853, she was mortgaged by her owners



to Messrs. Knapp & Stacy, of New York, to secure the payment of \$30,000. That said mortgage was duly recorded in the office of the Collector of Customs at the port of New York, in which office the said steamer was enrolled, and also in the office of the Register of Conveyances for the City of New York.

That under the control and in the employment of her owner she made frequent trips to the port of Baltimore, and that while here, during the last summer, certain repairs were made to her by the libellant, at the request and by the direction of her captain, which repairs were necessary and proper to enable her to complete her voyage, and that the prices charged for such repairs are at the usual and ordinary rates. That this libel was filed on the 18th of October, 1854, and the steamer was taken under the process of this Court and released on stipulation.

That on the 16th of September, 1854, a bill was filed in the Superior Court of the city of New York, by Messrs. Knapp & Stacy, to obtain a decree for the sale of said steamer, for the payment of the said mortgage debt, and on the 17th October, 1854, a decree was passed for the sale of the said vessel, under which decree she has been sold in New York, since she returned, and the proceeds of sale were not sufficient to pay the said mortgage claim.

No question has been raised, in the argument of this case, in reference to the conflict of jurisdiction. But the Court understands that to be waived, and its opinion to be invoked, and the case to be put upon the question "whether as against a prior mortgage of a vessel belonging to another state, recorded according to the provisions of the act of Congress of 29th July, 1850, a material man has a lien on the vessel for necessary supplies and repairs. No decision upon this point has been cited to the Court, by either of the counsel, and the Court has not been able, after diligent search, to find any. It is then a new question for the decision of the Court, and must depend upon the construction which the Court may give to the said act of 1850.

It is admitted in the argument of this case, that prior to the passage of the said act of Congress, material men had such a lien for repairs and supplies to a vessel belonging to another state



which could be enforced in this Court, and which no mortgage or sale of said vessel, by the owners, could interfere with or defeat.

This arose from two principles of the general maritime law: 1st. Every contract of the master, within the scope of his authority as master, in reference to the vessel, binds the vessel. And 2d. A man, who repairs or furnishes supplies to a ship, obtains thereby, without any express contract to that effect, a lien on the ship for remuneration. The Supreme Court, however, in the case of the *General Smith*, 4 Wheaton, 438, has restricted this last principle, to the cases of foreign ships, or ships in the ports of a state to which they do not belong. These principles were established by the general maritime law, for wise and beneficial purposes. Ships, the subjects of them, were frequently in necessity of repairs and supplies in distant portions of the world, where their owners were unknown or without credit, and to enable them to pursue their voyages, such a lien, of which I have spoken, became a necessity of the commercial world. And this without any reference to the condition of the title at home. Now, does the act of 1850, do anything more than make bills of sale and mortgages of vessels, when recorded, as valid and good against all persons, as they were before against the grantors, mortgagors and all persons who had notice of them? Clearly, before this act, whether a material man had notice of a prior mortgage or not, it did not affect his lien. The mortgagee was only responsible for supplies and repairs when in possession or in receipt of the profits of the voyage. But the material man suffers no detriment from having no claim upon the mortgage. His original remedy remains to him. He may proceed against the mortgagor *in personam*, or against the ship *in rem*. Now this is the law, as laid down by Flanders, in his late most excellent work on Shipping, a work published three years after the passage of the act of 1850, and which act is given in one of the notes appended to said work. Certainly this intelligent writer did not consider the act of 1850 as changing the law in this particular. And I find the same general principle recognized without any exception, in the first volume of Curtis' Commentaries on the Jurisdiction and Practice of the United States Courts, section 51, a work

which went to press in August last, more than four years after the passage of the act of 1850. In the case of *Weaver vs. The S. G. Owens*, decided by Judge Grier, in 1849, and reported in 1 Wallace's Reports, 368, that learned Judge remarks, "that no seizure by Buck, under his supposed legal title as mortgagee, would defeat or supersede any liens obtained by the libellants (who were material men) or others against the ship, while in possession of the Townsends. This was a case where the vessel had been sold by Buck to the Townsends, a part of the purchase money only paid, and in the conveyance, it was provided, that if the balance of the purchase money was not paid, the Townsends were to forfeit all claim of ownership in the vessel," and the registry was not changed. The supplies were furnished while the ship was in the possession of the Townsends, under this conditional sale. And in further illustration of this principle, and the reasons on which it rests, I will read a passage from the Court's opinion in the case of *Cole vs. The Atlantic*, to be found in Crabbe's Reports, 442. "The lien now sought to be enforced is given to the mechanic who furnishes work or materials to a vessel in a foreign port, which are necessary for the prosecution of her voyage. The policy of the law, as well as the principles of justice, regards this claim with high favor; and it does so, not more for the security of the mechanic, than for the general interests of commerce and the particular interests of the ship owner. A vessel bound on a distant voyage, with a valuable cargo, meets with a disaster which prevents her proceeding with safety, although in itself it may not be of much account, and may be repaired at small expense. She puts into a port where her owner has neither friends or credit, and unless the repairs can be made, the voyage will be broken up, and both vessel and cargo exposed to a ruinous diminution of value. In this situation the law says to the mechanic, release this vessel from her distress, save her owner from this loss, and the vessel herself, wherever she goes, shall be security for your payment. There is some generosity in the confidence thus given to strangers, because it is not without considerable hazard. The vessel may be lost, her owners may be distant or insolvent; the mechanic, nevertheless, permits her to go;

and the law will not suffer such a claim to be defeated on slight grounds, but will be astute to prevent it."

But the learned proctor for the claimants, in this case, contends, that the proviso at the close of the 1st section of the act of 1850, makes the recorded mortgage prevail over every other lien, except that created by bottomry bond. Now, can this be so, and if so, would it not be most impolitic and unjust? A material man who repairs a vessel or furnishes supplies to her, in a foreign port, without a bottomry bond, gets only the usual interest on his bill, and has to follow the vessel, frequently, to her home port, to receive his claims; and although her owners are liable to him *in personam*, if the vessel is lost on the voyage, he has lost his principal security. But if he refuses to furnish the supplies or lend the money to repair without a bottomry bond, he gets a heavy rate of interest, sometimes as high as thirty per cent., if the vessel reaches her home port. And a bottomry bond too, is only valid where the supplies furnished or money loaned were necessary to enable the vessel to prosecute her voyage. Now, did Congress mean to draw a distinction between these two liens, and to give to the one possessing the smaller claim to our favor the greater efficacy? I think not, but that it was only intended by the act of 1850, to give recorded bills of sale or mortgages of vessels, priority over any subsequent conveyance of them, made by those in possession of them, and over any rights acquired in them by general creditors, by judgments and by execution; and that it was not intended to interfere with these liens in favor of material men, given by the general maritime law. Such a construction of the act is in accordance with the equitable principles which prevail in the maritime law, and enter so largely into the adjudications of the Admiralty Courts. For all repairs and supplies to vessels in a foreign port are directly for the benefit of the mortgagee, by enabling the vessel to prosecute her voyage, and return to her home port, where she can be in reach of process to enforce his lien; and by her return adds to the means of the mortgagor to liquidate his mortgage debt. Entertaining these views I will sign a decree for the claim of the libellant, with interest and costs. And as this is a new question, and the twenty-six other cases now pending in

this Court, have been entered to abide the decision of this case, I have reduced my opinion to writing, and will file it in the case.

Since preparing my opinion in this case I have been referred to a recent decision in the District Court for Massachusetts, as reported in the Boston Daily Advertiser, of January 11th instant, in which Judge Sprague decides "that liens founded on the necessity of vessels abroad, are never displaced by mortgage titles."

Decree for libellant.

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*In the Washington County Supreme Court, State of Vermont,  
November Term, A. D. 1854.*

KENDALL BRUCE AND WIFE vs. HIRAM THOMPSON.

1. A marriage settlement incomplete by reason of a want of trustees, is only an agreement to make a settlement, and will not, at law, exempt the annual crops of the wife's land from an execution against the husband.
2. By the language of the Vermont Married Woman's Act, the annual product of the wife's land is not exempted from the husband's control, or from his creditors.

The opinion of the court was delivered by

REDFIELD, CH. J.—This action is brought to recover the value of property, sold by defendant, as an officer, upon execution, for the sole debt of the husband, the property being the annual products of the wife's land, in possession, and carried on at the expense of the husband. The parties, before their intermarriage, made, in contemplation of such an event, what they considered a marriage contract, which was a stipulation between themselves merely, and without the intervention of trustees, that the wife should enjoy her separate property, without interference, on the part of the husband. The statute law of the state, in force, at the time of the crops being grown, and which it is claimed, controls the matter, was as follows: "The rents, issues and profits of the real estate of any married

woman, and the interest of the husband, in her right in any real estate, shall, during coverture, be exempt from attachment or levy of execution, for the sole debt of the husband, and no conveyance by such husband, of such rents, issues and profits, &c., shall be valid, unless by deed of husband and wife," executed according to the general laws of the State.

It is claimed first, that the marriage settlement, as it is called, was sufficient to exempt the annual crops of the wife's land from attachment and levy of execution on the husband's debt. But such a control, without the intervention of trustees, will not, at law certainly, have that effect. Such a control, so executed, is incomplete. It is, at most, but an agreement to make a suitable marriage settlement. And the parties, beneficially interested, whether the wife or children, may, on application to a Court of equity, compel the execution of such a settlement, as the court shall deem reasonable, which will then be effective to protect the property at law. 2 Story's Eq. Jurisp. §§ 983, 999.

In regard to the effect of the statute, which is similar to those of some of the other American States, there seems to have been, to some extent, a popular impression, that it would exempt the annual products of the wife's land, from the control of the husband, or his creditors. Such was the decision of the court below, and such the impression of one member of this court, at the first argument. But a careful examination of the terms of the statute, cannot fail, we think, to convince all, that the words used have no very marked fitness, to express the yearly products of land, which are the joint results of labor and the use of the land. Rents, issues and profits, more commonly, in the books certainly signify a chattel real interest in land, a kind of estate growing out of the land for life, or years, producing an annual or other rent. And in this statute it is so coupled with "the interest of the husband in her right in any real estate," so as to induce the suspicion certainly, that the legislature supposed they were only limiting the husband's control over such estate, as he would upon the marriage, acquire in the wife's land, and really doing nothing more than securing to the wife and family, the use of the wife's chattels real, and the husband's estate, in her

lands, whether during coverture or by the courtesy. Their estates, (although growing out of the wife's lands,) by the common law, upon the marriage, become vested in the husband, and he may sell, assign, mortgage, or otherwise dispose of them. 2 Kent's Comm. 113.

They may, too, probably be levied upon, for the sole debt of the husband, or might have been before this statute. And the statute of this state, giving the right generally to levy upon leasehold estates, uses almost the same terms as the statute under consideration. "The rents, issues and profits of real estate, leased for life, or years, shall be liable to be taken on execution;" thus showing, that the two statutes might, very likely, have adopted the same form of expression *de industria*. Rent's, issues and profits, too, apply only to net profits, and such as are of the nature of rent, which is, as every one understands, a *reditus* or return, by some one, holding the land of another, for which he *owes* such *return*. Now the husband holds the wife's land, in no such *tenure*, but in his own right, as husband, *owing a return* to no one. It is observable too, that the legislature, in providing a homestead for the family, and securing its annual products for their support, use appropriate and specific language, by providing that the homestead, "and the yearly products thereof," shall be exempt from execution, and that the husband shall not alienate or mortgage the homestead, but no provision is made against his *conveying the yearly products* of the homestead.

And if we regard, in the statute under consideration, the terms "rents, issues and profits" as equivalent to *yearly products*, we must also allow, that this statute has, in express terms, required the transfer of such yearly products, to be by deed of the husband and wife jointly, and to give effect to such provision, we must hold, that any other mode of alienation, even for value, cash in hand, if you please, or necessities for the family, or to pay the very laborers upon the land, is altogether void.

The very use of the term *conveyance*, in the statute, with reference to this interest, shows the probable application of the term to some estate in the realty, for it is scarcely supposable, that the legislature

would have used such a term, requiring it to be executed, with all the solemnities of other deeds of real estate, for the transfer of mere personal chattels.

It may be supposed by some, perhaps, that this construction gives less adequate protection to the wife's property, which seems of late to be regarded as a very cherished object by all. But we can only say, it affords all the protection which the law gives at present, and to convey the protection the length claimed, would certainly be attended with serious inconvenience, and often produce injustice, and for one, I am ready to say, I have no expectation, the legislature ever supposed they were making any such provision, or that they ever will, so far as the conveyance or transfer of the yearly products of the wife's land is concerned.

Judgment reversed and case remanded.

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*In the Supreme Court of Pennsylvania.*

PATTERSON vs. ROBINSON.<sup>1</sup>

A married woman may give a judgment for the purchase money of real estate, but execution will be confined to the real estate purchased.

This was an action of debt on a bond given by Arabella Patterson, the plaintiff in error and the defendant below, to William Robinson, Jr., for the purchase money of two lots of ground in Allegheny City. In 1848, the plaintiff below, conveyed the lots to the defendant, Arabella Patterson. Eighty dollars were paid in hand, and for the balance, the purchaser, who was a married woman, gave her own judgment bond. The deed recited that the conveyance was subject to the payment of the bond. Judgment was entered on the bond by virtue of the warrant of attorney, which was opened, and defendant permitted to plead coverture. The fact of coverture was admitted, and the facts above set forth were submitted in a case

<sup>1</sup> We are indebted to the Pittsburgh Leg. Int. for this case.

stated. The Court below, WILLIAMS, P. J., gave judgment for the plaintiff in an able opinion.

The case was argued by

*T. J. Fox Alden, Esq.*, for plaintiff in error, and by

*Robt. McKnight, Esq.*, for defendant in error.

The opinion of the Court was delivered by

LEWIS, J.—The power which a married woman exercises over her real estate, is not a mere naked power; nor is it altogether analogous to a power coupled with an interest. It is the right of disposition incidental to ownership. The disability of coverture is thrown around her for the protection of the rights of herself and her husband. It is a shield for defence—not a weapon for mischief. When that disability is removed, or, what is the same thing, whenever the law permits her to act in relation to her estate, she acts as proprietor, and may exercise the rights of one. She has a right, by law, to sell her estate, with the consent of her husband, provided there is no coercion. To secure the one, and at the same time to guard against the other, she is required to *unite* with him in the execution of the conveyance, and to *separate* from him in the acknowledgment of it. 6 Harris, 506; 7 Harris, 361. If she exercises, in this form, her right to sell, she may dispose of her estate upon such terms and conditions as she deems most advisable. She may, therefore, mortgage it for her husband's debts; for a mortgage is but a sale on condition. 3 John. Ch. Rep. 144; 7 Harris, 402. And, for the same reason, she may prescribe such terms, and waive such privileges, as she thinks proper to prescribe or waive, so long as her acts are essentially a part of the contract of sale, and bind nothing but the property sold. This has just been decided in the case of *Black and wife vs. Galway*. By the common law, she may be grantee in a deed, without the consent of her husband. He may, it is true, divest the estate by his dissent. But if he neither agree nor disagree, the purchase is good. *Baxter vs. Smith*, 6 Bin. 427; 4 Cruise's Dig. 25. She may even be the grantee *upon condition*, and she will be bound to perform the condition,



“because it does not charge her person, but the land.” 1 Roll. Ab. 421; 2 Cruise’s Dig. 35.

In the case before us, the husband has not disagreed to the conveyance, and the estate is, therefore, vested in the wife. Under the operation of the act of 1848, it is to be “owned, used and enjoyed as her separate property.” But the same act that gives her these advantages, attaches conditions in *law* to the grant. The estate is to be liable for “debts contracted by herself, or in her name, by any person authorized so to do.” It is also to be liable “for debts contracted for the support and maintenance” of her “family, if no property of the husband can be found.” She cannot take the benefits without performing the conditions. Even under the law, as it stood before the act of 1848, she could not retain the estate conveyed, without paying the judgment given for the purchase money. *Heacock et al. vs. Fly*, 2 Harris, 540. But in this case, the judgment bond for the purchase money is expressly charged upon the land by the terms of the conveyance. The payment of the money is the condition subject to which she accepted the property, and upon no just principle can she hold it without performing the condition.

Under the act of 1848, her power to purchase gives her a right to contract for the payment of the consideration money, so far as to charge the property with such incumbrances as may be agreed upon to secure its payment. A judgment given for this purpose is, therefore, not void on the ground of coverture, and the application to deprive the creditor of the security for his money, was properly denied. If a Court permitted her to retain the property, and at the same time refuse to pay the consideration money, it would no longer deserve its designation of “a place where justice is judicially administered.” It is not proposed to charge the woman, personally, with the judgment; nor are we prepared to say that her other property is chargeable with the debt. But clearly, the property purchased is bound by a judgment given for the consideration money.

It is considered and adjudged, that the judgment of the District Court be affirmed, to be levied of the two lots, numbered 85 and 86, on Buena Vista plan, Second Ward, Allegheny, being the same

which were conveyed by the said William Robinson to the said Arabella Patterson, by deed of the 1st August, 1848, recorded in vol. 81, page 599, in consideration in part of the judgment aforesaid.

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*In the District Court for the City of Philadelphia.*

FRITZ vs. FISHER.

1. A judgment of one court will not be enforced by another, unless it is certain in itself, or is capable of being made so by intendment or presumption.
2. It seems, that a defence to the judgment of another State on the ground of want of notice should be pleaded; and that when it is not, the judgment will not be held invalid, merely because the record fails to show that notice was given.

The opinion of the Court was delivered by

HARE, J.—This is an action of debt against Fisher & Smith, founded on a judgment rendered by a justice of the peace in New Jersey.<sup>1</sup> The judgment as produced and proved in this

<sup>1</sup> (COPY OF RECORD.)

State of New Jersey, Camden county, ss.

In the Court for the trial of small causes, before Joseph B. Strafford, Esq., Justice.

<p>Andrew Fritz, plaintiff,                                            vs.          Henry Fisher and George A. Link,          defendant.</p>	}	<p>In trespass on the case, damage \$100.</p>
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May 25, 1853. Issued a summons in the above case, returnable before me on Wednesday, the 1st day of June next, at 2 o'clock, P. M. Constable returned the same, as follows: "Served the within May 25, 1853, on the said Henry Fisher, by reading it to him, a copy not required. C. H. Gordon, Constable."

June 1, 1853. Counsel for both parties sent me a note, requesting a postponement for two weeks, with an arrangement that plaintiff should then have the privilege of filing his state of demand; whereupon I adjourned the trial until the 15th inst. at 4 o'clock in the afternoon.

June 15, 1853. Parties appeared. Plaintiff filed his state of demand. Trial

court is against "defendants," but the record shows that Smith was the only person served with process, or who appeared in or defended the action. Fisher, consequently, contended at the trial, that the judgment as against him was a nullity; that the proof did not sustain the declaration, and that the plaintiff must fail on account of the variance. The point was reserved and is now before us for decision, and we have also to render judgment on a plea of nul tiel record, which raises nearly the same question.

All judgments derive their force from the powers conferred by the State, on the courts which render them, and are therefore necessarily void when those powers are exceeded. This principle applies equally to the highest tribunals of Westminster Hall, or our own country, and to the pettiest magistrate or most inferior court. A criminal information in the Common Pleas, a common recovery in the Queen's Bench, an action of ejectment in the high Court of Chancery, would be all so much waste paper, and could not be pleaded or given in evidence as a justification, in an action of trespass against the sheriff, or any other officer of those courts, who should act upon them, even in obedience to the commands of his superiors. This was settled as far back as the case of the Marshalsea, 10 Coke, 68-76, and has never since been questioned. If, says Lord Coke, citing and relying on the language of the court in the case of *Bower vs. Collins*, in the 22 Edward, 4, 33, b, "the court has not power and authority, then their proceeding is coram non judice: as if the Court of Common Pleas hold plea in an appeal of death, or robbery, or any other appeal, and the defendant is attainted, it

proceeded. Dudley, counsel for plaintiff. Dayton, for defendant. William Small, Lewis Yeager, Lewis Holtzworth, Restore Cook and David Brinnersholtz, were sworn as witnesses on part of plaintiff. Plaintiff also offered a transcript from Justice Curtis' docket, and several receipts from defendants to plaintiff, in evidence, which were received. After hearing the witnesses and the parties, I gave judgment in favor of the plaintiff against the defendants for one hundred dollars damages, and two dollars and twenty-seven cents costs.

I do hereby certify the above to be a true transcript from my docket, in the case as therein named. Witness my hand and seal at Camden city, in said county, this sixteenth day of November, A. D. eighteen hundred and fifty-three.

[ SEAL ]

JOSEPH B. STRAFFORD, J. P.

is *coram non judice: quod omnes concesserunt.*" Jurisdiction is presumed, said Parke, B., in delivering the judgment of the Exchequer Chamber in the case of *Gossett vs. Howard*, 10 Q. B. 359-548, "with respect to such writs as are actually issued by superior courts, that they are duly issued, and in a case in which they have jurisdiction, unless the contrary appears on the face of them, as it would, for instance, if a writ of *capias* for a criminal matter issued from the Common Pleas, or a writ on a real action from the King's Bench, or a real action not in the Crown's case from the Exchequer; in all of which cases the want of jurisdiction would appear." When, therefore, a court has no jurisdiction over the subject-matter of a cause, its judgment is void, and must be treated as such in every subsequent proceeding in which it is brought in question. But while the law thus strikes all judicial proceedings, which exceed their proper limits with utter inability, it makes certain presumptions in their favor, which experience has shown to be essential to the repose and safety of society. Thus, superior courts are presumed to exercise the powers committed to them properly, and their judgments will be held to be within their jurisdiction, unless the contrary appears on the face of the record, or upon a mere comparison of the subject-matter of the judgment, with the authority of the court. It is not necessary that the record should show jurisdiction, it will be enough if it do not directly or by a necessary implication negative its existence. This, indeed, is a mere application of the general maxim *omnia rite acta*, which has a wide and beneficial influence, not only in law, but in all the walks of life. But while it is universally conceded, that the record of a superior court need not show that its powers have been duly exercised over the subject-matter of the cause, there has been a wide difference of opinion in this country, whether the same rule applies to its jurisdiction over the persons of the parties, and whether a judgment can be valid, unless the proceedings on which it is based show, that the defendant was duly notified of their existence, or made himself amenable to the authority of the court, by a voluntary appearance. I say in this country, for I am ignorant of the existence of any case in England, which justifies the inference, that a domestic judgment

of a superior court can be impeached collaterally, on the ground that the defendant was not served with process; or that a plea of *nul tiel record* to an action of debt on a judgment of the Common Pleas or Exchequer could be sustained, by pointing out the want of all proof other than the judgment itself, that the defendant was before the court when it was rendered. In thus using the phrase other than the judgment, I wish to call attention to the natural presumption, that the court would not have rendered it without giving the defendant a day in court, on which he might answer the complaint made against him. It is admitted that the return of service by the sheriff, or the entry of appearance by the clerk cannot be controverted, and will be presumed to be right, in face of the most conclusive proof to the contrary; and it would seem that as much faith should be given to the acts of the court, as to the allegations of its officers. It was accordingly held by the Supreme Court of New York, in *Foot vs. Stevens*, 17 Wend. 483, and *Hart vs. Seixas*, 21 Id., 40, that a judgment cannot be impeached or set aside collaterally, for the failure of the record to show that the defendant had notice, or waived it by a voluntary appearance. Nor does this view of the law, leave the parties who have been injured by a judgment rendered without notice, without the means of redress, for they may either set it aside by an application to the court itself, or reverse it by a writ of error; it merely deprives them of the right to rely on the defect in a collateral proceeding, in which the truth of the case cannot be known, or what may be a mere clerical error corrected.

The principles which have been stated, as sustaining domestic judgments, seem to apply equally to those of other States. The same faith and credit which we give to our own records, are due to those of all the parts of that great whole which we call our country. So long as nothing is alleged, or shown to the contrary, their decisions must be presumed to have been guided by the same rules of justice which dictate our own; and even when this does not appear on the face of the record, the defect should be supplied by a favorable intendment. The defendant may indeed negative the presumption by pleading and proof; he may show that the court which has

assumed to bind him, had no authority over his person, and he may do this not only when the record is silent, but in opposition to its explicit entries or allegations; but if, instead of adopting this course, he confine himself to a plea of nul tiel record, and thus shut the plaintiff out from sustaining the record by extrinsic evidence, the judgment itself should be sufficient proof of its own validity.

But while the judgments of Superior Courts ought thus to be regarded as binding, not only in the state in which they are rendered, but elsewhere, until the contrary appears, a different rule seems to prevail with regard to the judgments of inferior courts. As the powers under which such courts act are limited, their acts will be void unless manifestly within the scope of their powers. No presumption can be made in favor of their jurisdiction; it must actually appear on the face of their proceedings. This, however, is only true as it regards their jurisdiction; for if that be proved or conceded, their acts will receive the same favorable construction as those of superior courts. In other words, if the power of the court to act, be once shown, it will be presumed to have been properly exercised. The principle is plain, but its application to the question, whether the record must show that notice was given to the parties, is not a little difficult. It may be said that as the power to give notice cannot be denied, the presumption ought to be that it has been duly exerted. On the other hand, if notice be an indispensable preliminary, without which the court can exercise no jurisdiction over the parties, and, therefore, cannot bind them by its decision, the failure to set it forth on the face of the proceedings will be a fatal defect, and may be relied on as such, in any collateral suit, in which they are pleaded or given in evidence, either as a defence or cause of action. The English cases are full and explicit to the point, that notice is indispensably necessary to give validity to the acts of inferior tribunals, and that proof of the want of notice will render their judgments nullities; *Bagg's case*, 11 Reports, 93 b., 99 a.; *Dr. Bentley's case*, 1 Strange, 537; *Rex vs. Benn*, 6 Term, 198; *Capel vs. Child*, 2 C. & J., 555; *Painter vs. The Liverpool Gas Company*, 3 A. & E., 433; *Ex parte Kenning*, 10 Q. B. 750; 4 C. B., 507, but are far from being equally explicit, with regard to

the effect of the failure of the record to show that it has been given. In *Rex vs. Venables*, 2 Lord Raymond, 1405, 1 Strange, 630, the King's Bench sustained a commitment by two justices, notwithstanding the objection that the defendant had not appeared or been summoned, and that it was contrary to natural justice to condemn any one without giving him an opportunity of being heard; but afterwards issued a criminal information against the justices, on affidavits that they had proceeded without notice to the parties interested. A similar point arose in *Rex vs. Clay*, 1 Strange, 475, where Pratt, C. J., contended, that an order of bastardy was void, in consequence of the failure of the record to show that the defendant had been summoned, because it was the act of an inferior court, and no presumption could be made in its favor, but the *puisne* judges expressed a decided opinion the other way, on the ground that as the power to issue the summons was unquestionable, it must be presumed to have been duly exercised; and Pratt seems to have yielded to their arguments, for the order was subsequently confirmed without opposition. These cases, taken in connection with those already cited, would seem to show, that while the want of notice is fatal, its existence will be presumed, unless the contrary is apparent on the face of the proceedings, or is shown by extrinsic evidence. But whatever the rule may be in England, the American decisions establish by a great preponderance of authority, that notice is necessary to give jurisdiction over the persons of the parties, and that a failure to set it forth in the proceedings of inferior courts, will render them void on the general principle, that the jurisdiction of such courts cannot be presumed, and must appear affirmatively in every essential particular.

These principles might suffice for the solution of the question now before us, if it related to the record of a court of this state. We should then know the nature and extent of the powers of the court, and could determine whether the want of proof of notice could be supplied by presumption. But the question is as to the validity of the judgment of another state, to which we owe the same faith and credit which it would and ought to have in the state in which it was rendered. Had the defendant pleaded that the judgment was invalid in New Jersey, and then given the law of that state in evi-



dence, he would probably have succeeded in sustaining the plea, for the case of *Hess vs. Coles*, 3 New Jersey, 116, seems to decide, that the failure of the record to show that notice was given, renders all judgments void. But as the defendant has rested his case solely on the point, whether there is such a judgment as the plaintiff has averred, we must rest our decision on general principles, without any special reference to the law of New Jersey. We have before us the solemn and official act of one of her magistrates, done in the discharge of his public duty, and we are bound to presume, not only, that he acted in pursuance of a power conferred by law, but that he duly exercised the power under which he acted. The sovereign authority which resides in every state, may bind its subjects and citizens by laws, and may not only enforce these laws through the medium of its tribunals, but may prescribe the mode in which those tribunals shall exercise the powers confided to their charge. It may dispense with notice altogether, or make publication a substitute for notice; and may certainly direct that proof of notice shall, or may be made otherwise, than by an entry in the minutes or record of the tribunal. Such a law would unquestionably be obligatory on every one domiciled within the boundaries of the state which enacted it, unless contrary to some constitutional prohibition. Whether a judgment, rendered in accordance with its provisions, would be enforced by the courts of a foreign government, or of a sister state, would depend on a variety of considerations. It might certainly, as in the case of judgments in proceedings commenced by attachment, bind and pass rights of property, even if it imposed no personal obligation; and it would probably be personally obligatory upon a citizen of the state in which it was rendered, unless it contravened some principle of natural justice, or some constitutional restriction. It would therefore seem that no court can be entitled to pronounce definitively, that the sentence of a foreign tribunal, or of a sister state, is void, merely because the record fails to show that notice was given. Whether notice was given or not, and whether the failure to give it renders the judgment invalid, are questions which should be raised by proper pleading. That the judgment of another state is invalid, for want of compliance with the



laws which conferred judicial authority upon the court, and prescribed the mode in which it should be exercised; that those laws are void or unconstitutional; that the defendant is a citizen of another state, and not bound by the judgment as an adjudication, for want of notice, nor as an act of the sovereign power of the state in which it was rendered, because not subject to its authority, may be, and no doubt are good defences to an action founded on the judgment. But unless the defendant himself sets up such a defence, no court can raise it for him. This would be too plain for argument if the objection were to the jurisdiction of the court over the cause, and is equally true when the question is as to its authority over the parties. A judgment of the Orphan's Court of this county, in an action of covenant, or a decree of this court surcharging an executor or administrator, would be a mere nullity, and would be unhesitatingly treated as such in any court of this state, and yet an action founded upon such a decree or judgment, in another state, could only be resisted by pleading the want of jurisdiction, and giving the laws of this state in evidence, in support of the plea.

It is true, that the 1st section of the 4th article of the Constitution of the United States, and the act of May 26th, 1790, passed by Congress, in pursuance of that section, make it the duty of the courts of each state, to give such effect to the records and judicial proceedings of other states, as they have by law or usage in the courts of the state where they had their origin. And it may be contended, that as the imposition of this duty, must confer the power necessary for its fulfilment, the judges of one state may take judicial cognizance of the laws of another, so far as may be necessary to ascertain the effect due to its judgments. But the difficulties attendant on an attempt, by a court, to expound a system of law, to which it is more or less a stranger, without the aid of specific information, verified, when necessary, by oath, are so great, that the safer course would seem to be, to adhere to the general rule of comity, which holds every judicial act of foreign tribunals binding, until some sufficient cause is shown to the contrary, in such a form as to permit evidence to be given to sustain or disprove its truth. When, indeed, the record shows affirmatively, or by a necessary intend-

ment, that the defendant was not subject to the jurisdiction of the court, whose decision is produced against him, the case may be different, for then the judgment is a nullity on its face, which can hardly be alleged, when there is no other ground for inferring a want of jurisdiction, than the absence of entries going to prove it. Had, therefore, the judgment in this case been a judgment explicitly against both defendants, in terms to put it beyond all doubt, that the magistrate, who rendered it, meant to charge both personally, we should probably have held it binding, even on the one who may not have been amenable to the authority of the tribunal from which it emanated, but who has failed to present the objection in such a form as to make it available. But all we have in the transcript of the record, now before us, to show that Fisher was meant to be included in the decision against his co-defendant, Smith, is an entry of judgment against "*defendants.*" All the previous proceedings, from the institution of the suit down to the time of this entry, are against Smith only. He is the only person served, the only person who appears to defend or contest the cause. Would it be reasonable, under these circumstances, to charge the other defendant, Fisher, without some better authority than a single "*s*" to show that he was included in the decision, without anything to show what was the nature or extent of the obligation imposed upon him. The plural may have been used instead of the singular, in giving the judgment, to make it accord with the writ; the laws of New Jersey may not permit, the magistrate may not have designed it to bind both the defendants personally. The common law held all obligations void, unless they were certain, or capable of being made so, and applied this rule quite as rigorously to judgments as to other things, as may easily be seen by a recurrence to the precedents. When a defendant has been served with process, or has appeared without service, it is reasonable to presume that a subsequent general judgment, is a judgment against him, for that which is not certain on the face of the judgment, becomes so, on looking at the previous proceedings. But to hold that a judgment shall bind a man, who is not named in it, and who does not appear to have been before the court when it was rendered, merely be-

cause it is in the plural number and not in the singular, would be pushing inference to a dangerous extent, and further than we are disposed to carry it. The rule for a new trial is consequently discharged, and judgment entered for the defendants, on the plea of *nul tiel record*, and on the point reserved.

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## LEGAL MISCELLANY.

### LEGAL PRINCIPLES.

#### No. III.

In our last number, we saw that in the law, as in mathematical science, one common result may frequently be deduced by different, independent processes of reasoning. Now we may further observe, that as no two correct mathematical processes will lead to opposite or conflicting conclusions, so will no two legal ones. A remembrance of this truth will always be of great service in testing the correctness of proposed legal principles.

Thus, one means by which we ascertain what is the law, is to consult that natural sense of right and justice which the Maker of us all has placed in the human mind. If there is proposed to us a legal principle, which we discover will legitimately lead to what the common understanding of mankind deems unjust, we conclude that the principle cannot and does not belong to the law. If, on the other hand, it uniformly conducts to what is just, we at once decide that it ought to be a part of our law, and set about seeing whether it really is so.

Now to establish, not merely that it ought to be, but in fact is, a principle of the law, we are not obliged to find any adjudication in which the judges have mentioned it as such, or adopted a course of argument from which we can infer so much as that it even occurred to their minds. So, on the other hand, if a judge, in a case which we know to have been correctly decided, has distinctly laid it down as a principle of the law, that does not necessarily establish it as such, though it may go far as evidence to our minds that it is. Courts

do not decide principles, but cases. All that is strictly authority, in a decision, is its legal conclusion, though it is in the highest degree satisfactory and helpful to see the course of legal reasoning by which the minds of the judges traveled to it. And if a conclusion of law is correct, we are apt to infer that the principles, or processes by which it was arrived at, are correct also; but there is nothing in the nature of things which makes this necessarily so, nor is it by any means uniformly so in fact. The good sense, or intuitive perceptions of a judge, may direct him to a right decision; but when he undertakes to show his reasons for it, he may be in fault at every step.

Yet if we suppose that all the cases in the books were correctly decided, on sound legal reasoning, still, as different processes from those employed might have brought out equally well the same results, it follows that the legal principles, which these different processes would have developed, are just as much principles of the law as if the development of them had actually been made. Suppose, then, a proposition is presented to us, and we wish to determine whether it is a principle of our law. Suppose we find, on examination, that it has never been recognized in any of the cases; but suppose we further find, that it will uniformly lead to conclusions which commend themselves as just, and, on bringing it to the test of the cases, find also that wherever it is applicable to the facts it leads to the same results which the judges arrived at by other processes of reasoning. Can any one deny that such a proposition is actually a principle of the law? It has in its favor all that any principle has; it conforms to abstract justice, and to the cases, which it harmonizes. Surely the fact, that no judge has happened to observe or mention it, cannot affect the question.

It is not only theoretically, but practically, important to understand that the courts adjudicate not principles, but cases. A failure to apprehend and appreciate this truth, has led to much embarrassment and confusion. When a judge has made up his mind how to decide a case, he arranges his reasons for the decision. In order to make his position look as strong as possible—judges being only men—he brings to its support such arguments as he can. Of these

arguments he may have a half dozen, more or less; and among them there will doubtless be one good one, and perhaps more, on which the case really reposes, while the rest are ranged along for show. Now, many lawyers do not distinguish the enunciations of judges on such occasions from legal principles. They find, indeed, that when they take these sayings for principles they are liable to be led astray; and so, growing, as they suppose, wiser by age and experience, they abandon all faith in the law as a science, and look upon it as a mere congregation of precedents, and upon those who represent it to be anything more as simple and visionary, not practical men like themselves. As well might a man who had been led into a bog by a jack-o'-lantern throw up his faith in the sun and the stars.

J. P. B.

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ABSTRACTS OF RECENT ENGLISH DECISIONS.

*Domicile—Anglo-Colonial Military Service—Practice—Administration of Estate.*—F., of Scotch family, born in Scotland about 1766–7, married his cousin, (the plaintiff,) a Scotchwoman, in 1787, accepted a service in the East India Company's service, and went to India in 1787, being then under age. The plaintiff soon after followed him out to India, and they both remained there, he serving under his commission until 1808, when they returned to England on furlough. A paternal estate in Scotland, A., having descended upon F., on the death of his father in 1794, he proceeded thither, and gave directions to build a mansion there. In 1812, his furlough having expired, F. and the plaintiff returned to India, where he remained, serving under his commission, until 1822. The plaintiff returned to England in 1816. In 1822, F. retired upon half-pay, and took up his abode in London, at first by a weekly hiring, but in 1823 he took a long lease, which he subsequently from time to time renewed, and which was still in existence at his decease, of the premises in Sloane street. His circumstances being very greatly improved, he kept a fitting establishment of servants at Sloane street, but no fitting establishment at A., beyond a cook and gardener, and additional servants hired by the month, in Aberdeen, upon the occasions of his visits to Scotland, which, however, were very frequent, viz: six months in each year; but from 1823 to 1830 the plain-

tiff only went there twice, and had never been there since 1830. F. exhibited great attachment to his patrimonial estate at A., and to Scotland generally; described himself in his deeds, and in his will, and generally, as "of A."; settled the estate in strict settlement, with a condition of residence; had a strong room in the mansion at A., where he kept his muni-ments of title, and his will and codicils—all but his last codicil made very shortly before his death. The will was dated in 1840, and was in the Scotch form, and made at Aberdeen. The testator was a Commissioner of Taxes and Justice of the Peace in Scotland, and generally exhibited great attachment to that country. On the other hand, he never took his wife, the plaintiff, to reside in Scotland, although he had an illegitimate family there; and from 1841 to his decease, in 1851, he never revisited Scotland, being prevented by ill health, although till 1844 he never relinquished the idea of returning. The testator died in 1851, in Sloane street: *Held*, that by going to India, and serving there under his commission, the testator abandoned his Scotch domicile of birth, and acquired an Anglo-Indian domicile; that this was not abandoned by his returning to England on furlough, and residence in England in 1808–12, but that it was abandoned upon his definite retirement in 1822; and that under the circumstances, the testator then acquired an English domicile, which he never afterwards abandoned.

It was thus unnecessary to determine what would be the effect of the continued residence in Sloane street during the last ten years of the testator's life, on the supposition that he had re-acquired a Scotch domicile in 1822–3; but if that had been necessary to be decided, the Court would have held that the permanent residence in London did not amount to a settled intention to change his domicile.

The following Canons were laid down:—

A man cannot, at least in reference to personal estate, have two domiciles.

Every person who is born in wedlock acquires by birth the domicile of his father, except perhaps a few excepted cases, as the Gipsies.

The domicile of an infant cannot be changed by his own acts.

A new domicile cannot be acquired unless by a concurrence of intention and act.

The strong intention of abandoning one domicile is not sufficient to displace it, until the new one be acquired.

The mere possession of real estate, not coupled with residence, is of no value whatever with reference to domicile.

The fact of a commission being held by a person in India or elsewhere, and his residence there accordingly, and fulfilment of the duties of his commission, is sufficient to give an Indian or Anglo-Indian, &c., domicile. Such an officer residing for four years in Great Britain on furlough, liable to be called on to return, and having the intention of returning if called on, and actually returning to active duty in India, retains his Anglo-Indian domicile, notwithstanding acts, such as building a mansion, &c., in Scotland, in the interim.

There does not appear to be any instance where a married man, having two habitual residences, in one of which his wife and principal establishment reside, and the wife not going to the other residence, and he having no such proper establishment there, has not been held to be domiciled in that residence in which the wife resides.

Where a person has two residences, in one of which he can, and in the other cannot, reside during the whole year, on the ground of ill health, and increasing years will tend to augment and establish the difference, that will be considered a good reason for holding the former residence to be the principal one, and the domicile; the question not being similar to that of his being compelled, on the score of health, to go for a time to a place not in any way his residence, *e. g.* to Madeira. *Forbes vs. Forbes*, 18 Jur. 642; V. C. Wood.

*Will—Construction—Statute of Distributions—Husband and Wife.*—Bequest in trust for the person or persons who would, at the death of a feme covert, be entitled as next of kin or otherwise, to her personal estate, under the statute of distributions, and in the same proportions and manner—husband of the feme covert not entitled. *Milne vs. Gilbert*, 18 Jur. 611. L. JJ. of App.

*Will—Construction of the word “Unmarried.”*—Bequest to the son and unmarried daughter of G. D. G., as he (G. D. G.) might by will direct, and failing such direction, to them equally, the word “unmarried” applies to the date of the will of the original testator, and the bequest is not affected by subsequent marriage in his lifetime, or after. *Hall vs. Robertson*, 18 Jur. 635, before L. J.J., overruling S. C. 17 Jur. 574.

*Will—Devise to heir male of Freehold and Gavelkind Estates.*—Devise of freehold and gavelkind estate to any male heir, and his heirs in strict tail male—heir male at common law entitled, as *persona designata*, to whole. Lord Coke’s opinion (Co. Litt. 10a,) has never been overruled. *Thorp vs. Owen*, 18 Jur. 641. V. C. Stuart.

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LIABILITIES OF LODGING-HOUSE KEEPERS.<sup>1</sup>

The law on this very important branch of contract is now completely unsettled by the recent difference of judgment in the Court of Queen's Bench, in the case of *Dansey vs. Richardson*, 23 Law J., Q. B. 217.

We will state the case and the *rationale* of the conflicting judgments, and then adventure a few remarks upon the law, as it seems to us to be, on a subject, which the large amount of property and responsibility at stake render it desirable should be determined with as little delay as possible.

The plaintiff was a lady, boarding in the house of the defendant at a weekly payment, upon the terms of being provided with board and lodging, and attendance. The plaintiff being about to leave the house, sent one of the defendant's servants to purchase some biscuits, and he left the door ajar, and whilst he was absent on the errand, a thief entered the house and stole a box of the plaintiff's from the hall. The learned judge directed the jury, that the defendant was not bound to take more care of the house and the

<sup>1</sup> 52 Lond. Law Mag. 153.



things in it than a prudent owner would take, and that she was not liable if there were no negligence on her part in hiring and keeping the servant; and he left it to the jury to say whether, supposing the loss to have been occasioned by the negligence of the servant in leaving the door ajar, there was any negligence on the part of the defendant in hiring or keeping the servant. It was held by the Court, that at least it was the duty of the defendant to take such care of her house, and the things of her guests in it, as every prudent householder would take. Lord Campbell, C. J., and Coleridge, J., held, that she was bound, not merely to be careful in the choice of her servants, but absolutely to supply the plaintiff with certain things, and to take due and reasonable care of her goods; and that, if there had been a want of such care as regarded the plaintiff's box, it was immaterial whether the negligent act was that of the defendant or her servant, though every care had been taken by the defendant in employing such servant; and, consequently, that the direction of the learned judge was not correct.

Wightman and Erle, JJ., however, held, that the defendant was not bailee of the goods, and that her duty required merely that she should take the same care of her lodger's goods that a prudent owner would do of her own, and that as there was no proof that the defendant had been negligent in hiring trustworthy servants, she could not be held answerable for a single act of negligence, such as that which occasioned the loss in question.

There was, apparently, no doubt that the servant must be deemed the agent of the defendant, and that the usual sequences of that relation attach to this case; so Story's *dictum*, "that the master is always liable to third persons for the misfeasances, and negligence, and omissions of duty of his servant, within the scope of his employment," is *prima facie* applicable to this case. The point at issue is, what kind of misfeasances and negligences is a lodging-house keeper liable for? Must it be actual or constructive negligence? And is she so liable for the safe custody of her tenant's goods as, for example, a carrier or railway company, for negligence by their servants, without any fault or laches on her own part? In fact, the question may be still more briefly summed up in this—Was the defendant a

bailee for reward or not? If she were, her liability is clear and undisputed; for, as Story holds, the hirer (or hiree, as the case may be) is not only liable for his own personal default and negligence, but for that of his children, servants, and domestics about the thing hired. And in this case the law, both old and new, is sufficiently explicit, as these cases suffice to show:—

“If a man brings a horse to a smith to be shod, and the servant pricks it; or if the servant of a surgeon makes the wound worse; in both these cases an action lies against the master. (Bac. Abridg. “Master and Servant,” K. See *Pilkington’s Case*, 21st vol. Abridg. 693; Cro. Eliz. 181.)

“The master must also answer for torts and injuries done by his servant in execution of his authority; as where a pawnbroker’s servant took a pawn, the pawner came and tendered the money to the servant, who said that he had lost the goods; upon which the pawner brought trover against the master, and it was held well. (2 Salk. 441, part 2, per Holt, C. J. See also Lord Raymond, 788, Cas. temp. Holt.)

“So where a carter’s servant run his cart over a boy, it was held the boy should have his action against the master for the damage he sustained by this negligence.” (Cited in the last case.)

So also the servant of the hirer leaving the stable-door open, so that the vendor’s horse is lost, or the agister the gate of the field: it is admitted that these are negligences of the servant which render the master liable, but because he is bailee.

Justices Wightman and Erle held that the defendant was *not* bailee; and the latter justly put the question thus:—

“In the class of cases relative to certain bailees for reward, who are liable for the loss of the goods, if they are stolen through the negligence of their servants, the goods are delivered to and are in the possession of the bailee, who, by the contract of bailment for reward, undertakes a private duty to the bailor to keep them with care, and to deliver them again; and this private duty is the test to ascertain whether any alleged state of facts amounts to actionable negligence; for the question, whether given facts amount to actionable negligence depends upon the legal duty owed to the party who

affirms the negligence to be a breach of the duty owing to him by the opposite party."

Mr. Justice Erle assumes that there was no bailment for reward, on what we confess, with great deference to his better judgment (and be it admitted that he tried the case), is a series of mistakes in *fact*, rather than in law.

1. He says, "there was no delivery of the goods of the plaintiff to the defendant." Indeed, not when they were delivered to the defendant's servant within the scope of the duties which the defendant contracted, by her servants, to perform? And was not this precisely what took place when the goods were placed in the custody of the servant, and when, as the case states, he carried her trunk down stairs, and placed it ready for her departure in the hall? Delivery can scarcely be more complete.

2. Mr. Justice Erle says, "there is no contract to keep them [the goods] with care, and deliver them again." There is just as much a contract to keep the lodger's goods with care, as to keep herself with care. And it seems to be just as much a breach of that contract to cause the loss of her goods, by negligence, in leaving a door open, as to cause the loss of her health by negligence in giving her bad food or a damp bed.

3. "There is," adds Mr. Justice Erle, "no reward in respect of goods, the terms being the same for a boarder whether with or without goods." If so, then a boarding-house keeper can, of course, refuse admittance to his guest's luggage. If it is no part of the contract he has entered into to board the lodger at two or three guineas per week, as in this case, to house his goods, and if, as the judge further says, "there is no duty of keeping them, owing from the defendant to the plaintiff," there is certainly no duty of receiving; and the boarding-house keeper may refuse to give them admission when they are brought to her house. It is often hazardous to handsomely papered and carpeted staircases to have heavy boxes carried up them, and lodging-house letters are under an obligation to Mr. Justice Erle for the convenient consequences which flow from his decision. Again, does Mr. Justice Erle repeat in his judgment, that "the goods of the plaintiff remained in her possession

and under her control, and were disposed of by her as she chose, without notifying what she had done to the defendant?"

This is obviously not so. They were placed, as we said before, not only constructively under her care when they entered the house, of which she, and not the plaintiff, had the control; but they were placed specially under her care by being so placed in the hands of her servant; one of whose express duties it was to deal with and take custody of them. The plaintiff needed no notification of her possession of the goods, inasmuch as it cannot be seriously disputed that the boarding-house keeper does contract to receive the goods, as well as the person of his lodger: and this is implied *ex necessitate* in the nature of the contract. And if notification were necessary of the special custody by the servant of the goods, it was also sufficiently implied by the knowledge the defendant had of the plaintiff's departure, and the customary duty thereupon devolving on her servant to remove the luggage of the departing guest.

We have therefore in this case every fact which can make the defendant bailee for reward. It is admitted that she lodged the plaintiff for reward, and it is absurd to deny that she also lodged for reward that which was essential to the lodger's enjoyment of her contract, namely, her luggage. Mr. Justice Erle's hypothetical lodger, without any goods, would certainly be an eccentric phenomenon; at any rate, a very abnormal lodger; imposing small necessity on other lodgers, to notify their possession of wearing apparel and its presence in their lodgings. The defendant also was the constructive depositary of the goods, just as much as any warehouseman or carrier. Her house received them; her servant had sole charge of the safe keeping of the goods in that house when they were lost; and she, the defendant, had sole control over the servant. This case comes, therefore, in all natural respects within that class of cases referred to in the famous judgment of Lord Mansfield in *Coggs vs. Barnard*—

"But if he or his servant leave the house or stable doors open, and the thieves take the opportunity of that, and steal the horse, he will be chargeable, because the neglect gave the thieves the occasion to steal the horse. Bracton says, 'the bailee must use the utmost

care, but yet he shall not be chargeable where there is such a force as he cannot resist.' "

The nature of the relation between the plaintiff and defendant being thus clearly that of bailor and bailee for reward, it is quite irrelevant to import into the consideration of the case, what care the defendant did or did not take in hiring trusty servants. It is presumable the railway directors take especial care to select careful drivers and guards of their trains; yet what railway company ever yet dreamt of pleading to an action for injury to a passenger or his goods, that they had taken due exercise, care, and discretion, in selecting and hiring their servants! But such a question is wholly impertinent to the issue under any aspect. If the lodging-house keeper never has charge or even cognizance of her lodger's goods, as Mr. Justice Erle contends, it is quite immaterial whether she has careful servants or not, for they have no duty to perform in respect to the lodger's goods, and can therefore be guilty of no breach of duty respecting them: at any rate, none such as can implicate their mistress. If the defendant had charge of the goods, no care she may have taken to hire careful servants can exempt her from her liability as bailee for reward. According to Justices Erle and Wightman in this case, there must be double negligence,—first, in the mistress as regards the hiring of the servant; secondly, in the servant in not taking proper care of the goods. Very justly and ably did Mr. Justice Coleridge say this "seems to me a novelty in the law, without a foundation in any satisfactory principle, complicating the inquiry for the jury very inconveniently, and likely to lead them to unjust conclusions." It also introduces a most impracticable and vague standard of liability. The irresponsibility of the master is, as the learned judge also said, "consistent with the grossest negligence, even misfeasance of the servant; for a mistress who uses all ordinary care in the hiring and over-looking of her domestics, yet may take careless or willful servants, or drunken ones, or she may unfortunately have a servant who is commonly sober, and yet who, upon one occasion being intoxicated, may occasion great loss or injury to the goods of the guests in the house."

From the great facilities for robbery and loss by inadvertence

and negligence in an inn, an innkeeper is held liable with much more strictness<sup>1</sup> for the goods of his guests in his house, although he may be entirely ignorant of their existence there. But still a liability also devolves on boarding and lodging-house keepers, by no means very different in degree, for the circumstances are not dissimilar.

We much regret the unsettled state in which practically the law is left by the view which those estimable judges, Justices Wightman and Erle, took on the subject of this case. We, however, cannot do better than cite the following common-sense lucid statement of what always has been the law, and we trust always may be, on this important branch of the law of contracts, from Lord Campbell's judgment:—

“I think there may be negligence in a servant in leaving the outer door of a boarding-house open, whereby the goods of a guest are stolen, which might render the master liable. I think there is a duty on his part, analogous to that incumbent on every prudent householder, to keep the outer door of the house shut at times when there is a danger that thieves may enter and steal the goods of the guest. If he employs servants to perform this duty, while they are performing it they are acting within the scope of their employment, and he is answerable for their negligence. He is not answerable for the consequences of a felony, or even a willful trespass committed by them; but the general rule is, that the master is answerable for the negligence of his servants while engaged in offices which he employs them to do; and I am not aware how the keeper of a lodging-house should be an exception to the rule. He is by no means bound to the same strict care as an innkeeper; but within the scope of that which he ought to do, I apprehend that he is equally liable, whether he is to do it by himself or his servants. The doctrine, that inquiry is to be made, whether the master was guilty of negligence in hiring or keeping the servants, is, I believe, quite new.”

We trust it will prove equally evanescent, as we are sure that it

<sup>1</sup> A strictness somewhat weakened by the late decision in *Amistead vs. Wilde*, Q. B., where the defendant was held exonerated because his guest had displayed money and then put it into an insecure box.

has never been acted on in the practical working of the law. So far from agreeing with Wightman and Erle, JJ., that the fact of there having been hitherto no decision expressly declaring the liability of lodging-house keepers, is a proof that they are right in their judgment, we submit that it is just as admissible as a proof that they are wrong: for a rule of law perfectly understood and generally acted upon, is for that very reason seldom the subject of the decision or *dictum* of a Court *in banco*.

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### RECENT AMERICAN DECISIONS.

*In the Supreme Court of the United States, December Term, 1854.*

WILLIAM FONTAIN, APPELLANT, vs. WILLIAM RAVENEL.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

1. A testator devised as follows: "Forasmuch as there will be a surplus income of my estate beyond what will be necessary to pay my said wife's annuity and the other annuities, I do therefore direct my said executors to invest the said surplus income and all accumulation of interest arising from that source yearly, for and during all the term of the natural life of my said wife, \* \* \* \* and from and immediately after the decease of my said wife, then all the rest, residue and remainder of all my estate, \* \* \* \* I authorize and empower my executors, or the survivor of them, after the decease of my said wife, to dispose of the same for the use of such charitable institutions in Pennsylvania and South Carolina as they or he may deem most beneficial to mankind, and so that part of the colored population in each of the said States of Pennsylvania and South Carolina shall partake of the benefit thereof." All the executors of the will died before the testator's widow, and without having attempted to make an appointment under the power conferred on them. *Held*, That the disposition of the residuary estate of the testator, subject to the power of appointment of the executors, failed, and that the heirs and next of kin of the testator were entitled to it.
2. No Court of Chancery, either in South Carolina or Pennsylvania, can administer the fund in question, and it remains unaffected by the bequest, because the means through which it was to have been given and applied have failed.
3. In England, when the Chancellor directs the application of property which has been the subject of an ineffectual charitable disposition, in accordance with the will of the sovereign, indicated under the sign-manual, or when that officer



himself executes the *cy pres* power in regard to such property, he does not act in the discharge of his ordinary chancery powers.

4. No special trust is vested in the executors, by reason of this power of appointment. It is separable and distinct from their ordinary duties and trust as executors. It was to be exercised after the death of the wife of the testator; but the executors died before her decease, and consequently they had no power to make the appointment. The conditions annexed by the testator to the power rendered the appointment impossible.
5. There must be some creative energy to give embodiment to an intention which was never perfected. Nothing short of the prerogative power, it would seem, can reach this case. There is not only uncertainty in the beneficiaries of this charity, but there is a more formidable objection—there is no expressed will of the testator. He intended to speak through his executors, or the survivor of them, but by the acts of Providence this has become impossible. It is then as though he had not spoken, and no power can now speak for him except that of the *parens patriæ*.
6. When there is nothing more than a power of appointment conferred by the testator, there is nothing on which a trust, on general principles, can be fastened. The power given is a mere agency of the will, which may or may not be exercised at the discretion of the individual. And if there be no act on his part, the property never having passed out of the testator, it necessarily remains as a part of his estate. To meet such cases, a prerogative power, such as that of the king, in England, must be invoked, which there, through the Chancellor, can give effect to the charity.
7. Some late decisions in England, involving charities, evince a disposition rather to restrict than enlarge the powers exercised on this subject. An arbitrary rule in regard to property, whether by a king, or chancellor, or both, leads to uncertainty and injustice.

The nominal plaintiff below, who is the appellee, is the administrator of the estate of the decedent *de bonis non cum testamento annexo*. His interest is with the defendant, as he and his family are the next of kin and heirs at law of Mr. Kohne.

The bill is filed by certain charitable societies of Philadelphia, in the name of the plaintiff, and it claims the appropriation of the residuary estate of Mr. Kohne, for themselves, and the other charitable societies of Pennsylvania and South Carolina, under the directions contained in Mr. Kohne's will, (which is hereinafter recited): first seeking to recover from the defendant, as executor of Mrs. Eliza Kohne, so much of that estate as came to her hands, as the executrix of Mr. Kohne's will, and which she distributed as undisposed of property, after the death of her co-executors.



Mr. Kohne, the testator, was a native of the kingdom of Prussia, and came to this country in the year 1789; immediately thereafter he established himself in business in the city of Charleston, South Carolina.

There was some evidence to show that his domicil remained unchanged during his whole life; and on the other hand, there was evidence that, at the time of his death, his legal residence was in Philadelphia.

Mr. Kohne, the testator, died on the 26th of May, 1829, leaving a large amount of real and personal estate, of the then value of about \$611,000, exclusive of his real estate at Charleston.

By his will, which is dated April 28, 1829, he gave to his wife certain personal property, and an annuity of \$10,000, with the power of appointing a sum of \$10,000 by her will, and he also devised to her the residue of his Charleston real estate and his Philadelphia dwelling house and country seat, for the term of her life, authorizing and empowering her to dispose of a portion of his Charleston real estate, "to such religious institution or institutions, in fee simple, and for such purposes as she might see fit."

The testament closes with the provision, which gives rise to the present controversy, "forasmuch as there will be a surplus income of my estate, beyond what will be necessary to pay my said wife's annuity and the other annuities, I do therefore direct my said executors to invest the said surplus income, and all accumulation of interest arising from that source yearly, for and during all the term of the natural life of my said wife, in the purchase of such stocks or securities of the United States, or the State of Pennsylvania, or of any other State or States of the United States, or of the City of Philadelphia, bearing an interest, as they, in their discretion, may see fit; and from and immediately after the decease of my said wife, then all the rest, residue and remainder of all my estate, including the fund which shall have arisen from the said surplus income aforesaid, after payment of the legacies hereinbefore directed to be paid after the decease of my said wife, and after providing for the payments of the annuities hereinbefore given of those annuitants who may then still be living, I authorize and em-

power my executors, or the survivor of them, after the decease of my said wife, to dispose of the same for the use of such charitable institutions in Pennsylvania and South Carolina as they or he may deem most beneficial to mankind, and so that part of the colored population, in each of the said States of Pennsylvania and South Carolina, shall partake of the benefit thereof; and I do hereby further authorize and empower them, or the survivor or survivors of them, after my said wife's decease, for the better and more easy disposing of my said residuary estate, as aforesaid, to sell, and to make and execute good and sufficient deeds and conveyances of real estate, not hereinbefore specifically disposed of, to the purchaser or purchasers thereof, his, her, or their heirs and assigns, in fee simple."

The executors thus authorized and empowered, after the decease of the testator's wife, to dispose of his surplus estate with its accumulations, were his wife, his "respected friends John Bohlen and Roberts Vaux, of the City of Philadelphia," and his "respected friend Robert Maxwell, formerly of Charleston." All of the executors died before the wife of the testator. Mrs. Kohne died in the City of Philadelphia, on the 1st day of March, 1852.

Mr. Justice McLEAN delivered the opinion of the court.

This is an appeal in chancery, from the Circuit Court of the United States for the Eastern District of Pennsylvania.

The case involves the construction of the will of Frederick Kohne. He first settled in Charleston, South Carolina, where he engaged in active business and accumulated a large fortune. For many years before his death, his residence was divided between Charleston and Philadelphia. At the latter place he added much to his wealth in the acquisition of real and personal property. He had furnished houses in both cities, and a country-house in the neighborhood of Philadelphia. Until his health became infirm he resided a part of the year in the South, and the other part in the North. In May, 1829, he died in Philadelphia, where his will was made and published in the month of April preceding his death. In his will he declared himself to be of the city of Philadelphia.

After giving several annuities to his wife and others, and legacies to his friends in this country and in foreign countries, to charitable objects, and providing for the payment of them, he declares, "forasmuch as there will be a surplus income of my estate, beyond what will be necessary to pay my said wife's annuity and the other annuities, I do therefore direct my said executors to invest the said surplus income and all accumulation of interest arising from that source yearly, for and during all the term of the natural life of my said wife, in the purchase of such stocks or securities of the United States or the State of Pennsylvania, or of any other State or States of the United States, or of the city of Philadelphia, bearing an interest, as they in their discretion may see fit; and from and immediately after the decease of my said wife, then all the rest, residue and remainder of all my estate, including the fund which shall have arisen from the said surplus income aforesaid, after payment of the legacies hereinbefore directed to be paid, after the decease of my said wife, and providing for the payment of the annuities hereinbefore given, of those annuitants who may then be still living, I authorize and empower my executors or the survivor of them, after the decease of my said wife to dispose of the same for the use of such charitable institutions in Pennsylvania and South Carolina as they or he may deem most beneficial to mankind, and so that part of the colored population in each of the said States of Pennsylvania and South Carolina shall partake of the benefits thereof." His wife, Eliza Kohne, John Bohlen and Roberts Vaux, of the city of Philadelphia, and Robert Maxwell, of the city of Charleston, were appointed executors.

Mrs Kohne survived her co-executors some years, and then died, having made her last will and testament, and appointed James L. Petigru and William Ravenel, the defendant, executors, the latter of whom obtained letters testamentary in the county of Philadelphia. And on the 15th of October, 1852, William Fontain, the complainant, obtained letters of administration de bonis non, on the estate of Frederick Kohne, deceased; he being the nearest of kin to the deceased, and one of his heirs at law.

The bill is filed in the name of the complainant, by certain charitable societies of Pennsylvania and South Carolina, under the directions

of the will, to recover from the defendant, as executor of Mrs. Kohne, so much of the property as came to her hands as the executrix of her husband's will, and which she distributed as undisposed of property, after the death of her co-executors. And the question in the case is, whether the residuary bequest in the will, which authorized his executors or the survivor of them, after the death of his wife, to dispose of the surplus "for the use of such charitable institutions in Pennsylvania and South Carolina as they might deem most beneficial to mankind," has lapsed, no such appointment having been made or attempted to be made during the lifetime of the executors. This part of the property is understood to have amounted to a large sum.

The domicil of the testator, at the time of his death, seems not to be a controverted question. He had so lived in the two States of Pennsylvania and South Carolina, and amassed property in both, that his domicil might be claimed in either. There is no evidence in which, if in either, he exercised the right of suffrage. For two years previous to his death he resided in Pennsylvania.

The bequest under consideration was intended to be a charity. The donor, having entire confidence in his executors, substituted their judgment for his own. They, or the survivor of them, was to designate such objects of his charity in the two states "as would be most beneficial to mankind." It was to be placed on the broadest foundations of human sympathy, not excluding the colored race. It is no charity to give to a friend. In the books it is said, the thing given becomes a charity, where the uncertainty of the recipients begins. This is beautifully illustrated in the Jewish law, which required the sheaf to be left in the field for the needy and passing stranger.

It may be admitted that this bequest would be executed in England. A charity rarely, if ever, fails in that country. The only question there is, whether it shall be administered by the chancellor in the exercise of his ordinary jurisdiction, or under the sign manual of the Crown. Thus furnished with the judicial and prerogative powers, the intent of the testator, however vaguely and remotely expressed, if it be construed into a charity, effect is generally given

to it. It is true, this is not always done in the spirit of the donor, for sectarian prejudices, or the arbitrary will of the king's instruments, sometimes pay little or no regard to the expressed will of the testator.

The appellants endeavor to sustain this charity, under the laws of Pennsylvania. This is according to the course of the court. The case of *The Philadelphia Baptist Association vs. Hart's Executors*, 4 Wheat. 1, was decided under the laws of Virginia, which had repealed the statute of 43 Elizabeth. In *Beatty vs. Kurtz*, 2 Peters, 566, the pious use of a burial-ground was sustained under the Bill of Rights of Maryland. The case of *Wheeler vs. Smith*, 9 How. 55, was ruled under the laws of Virginia. And in the case of *Vidal vs. Girard's Executors*, the laws of Pennsylvania governed.

In *Wheeler vs. Smith*, this court said, when this country achieved its independence, the prerogatives of the Crown devolved upon the people of the States. And this power still remains with them, except so far as they have delegated a portion of it to the Federal Government. The sovereign will is made known to us by legislative enactment. The State, as a sovereign, is the *parens patriæ*.

There can be no doubt that decisions have been made in this country on the subject of charities, under the influence of English decrees, without carefully discriminating whether they resulted from the ordinary exercise of chancery powers, or the prerogatives of the Crown.

The courts of the United States cannot exercise any equity powers, except those conferred by acts of Congress and those judicial powers which the high Court of Chancery in England, acting under its judicial capacity as a court of equity, possessed and exercised, at the time of the formation of the Constitution of the United States. Powers not judicially exercised by the chancellor, merely as the representative of the sovereign and by virtue of the king's prerogative as *parens patriæ*, are not possessed by the circuit courts.

In 2 Story's Eq. 431, it is said: "But as the Court of Chancery may also proceed in many, although not in all, cases of charities by original bill, as well as by commission under the statute of Eliza-

both, the jurisdiction has become mixed in practice; that is to say, the jurisdiction of bringing informations in the name of the attorney-general has been mixed with the jurisdiction given to the chancellor by the statute. So that it is not always easy to ascertain in what cases he acts as a judge, administering the common duties of a court of equity; and in what cases he acts as a mere delegate of the Crown, administering its peculiar duties and prerogatives. And again, there is a distinction between cases of charity, where the chancellor is to act in the Court of Chancery, and cases where the charity is to be administered by the king, by his sign-manual. But in practice the cases have been often confounded from similar causes."

"It is a principle in England that the king, as *parens patriæ*, enforces public charities, where no person is entrusted with the right. Where there is no trustee, the king, by his lord chancellor, administers the trust, as the keeper of the king's conscience; and it is not important whether the chancellor acts as the special delegate of the Crown, or the king acts under the sign-manual, his discretion being guided by the chancellor."

It may be well again to state the precise question before us. "The executors or the survivor of them, after the decease of the testator's wife, was authorized to dispose of the property, for the use of such charitable institutions in Pennsylvania and South Carolina as they or he may deem most beneficial to mankind."

No special trust is vested in the executors, by reason of this power of appointment. It is separable and distinct from their ordinary duties and trust as executors. It was to be exercised after the death of Mrs. Kohne; but the executors died before her decease, and consequently they had no power to make the appointment. The conditions annexed by the testator rendered the appointment impossible. Had the contingency of the death of Mrs. Kohne happened, as the testator from her advanced age contemplated, during the life of the executors or the survivor of them, the appointment might have been made at his or their discretion. But had they or the survivor of them failed to make it, it might have become a question whether he or they could have been coerced to do so by the exercise of any known chancery power in this country. The will

contained no provision for such a contingency, and it could not be brought under the trust of executorship. Chancery will not compel the execution of a mere naked power. 1 Story's Eq., sec. 169. But it will, under equitable circumstances, aid a defective execution of a power. A power when coupled with a trust, if not executed before the death of the trustee, at law the power is extinguished, but the trust, in chancery, is held to survive.

The testator was unwilling to give this discretion to select the objects of his bounty, except to his executors. He relied on their discrimination, their judgment, their integrity and fitness, to carry out so delicate and important a power. He made no provision for a failure in this respect, by his executors or the survivor of them, nor for the contingency of their deaths before Mrs. Kohne's decease. They died before they had the power to appoint, and now what remains of this bequest, on which a Court of Chancery can act?

There must be some creative energy to give embodiment to an intention which was never perfected. Nothing short of the prerogative power, it would seem, can reach this case. There is not only uncertainty in the beneficiaries of this charity, but behind that is a more formidable objection. There is no expressed will of the testator. He intended to speak through his executors or the survivor of them, but by the acts of Providence this has become impossible. It is then as though he had not spoken. Can any power now speak for him, except the *parens patriæ*? Had he declared that the residue of his estate should be applied to certain charitable purposes, under the statute of 43 Elizabeth, or on principles similar to those of the statute, effect might have been given to the bequest, as a charity, in the State of Pennsylvania. The words, as to the residue of his property, were used, in reference to the discretion to be exercised by his executors. Without their action, he did not intend to dispose of the residue of his property.

It is argued, "that in England the chancellor, in administering charities, acts as the delegate of the Crown, inasmuch as he discharges all his judicial functions in that capacity." If by this it is intended to assert, that the chancellor, in affixing the sign-manual of the king, or when he acts under the cy-pres power, is in the dis-



charge of his ordinary chancery powers, it does not command our assent.

The statute of 43 of Elizabeth, though not technically in force in Pennsylvania, yet by common usage and constitutional recognition, the principles of the statute are acted upon in cases involving charities. *Witmon vs. Lex*, 17 Serg. & Rawle, 88.

In the argument, the case of *Maggridge vs. Thackwell*, 7 Ves. 86, was cited, as identical with the case before us. "The only difference between that case and this one, it is said, is, that in the former the devise was for objects not defined, as they are in this case." In this the counsel are somewhat mistaken, as the case of *Maggridge* will show.

The devise in the will of Ann Cam was, "and I give all the rest and residue of my personal estate unto James Vaston, of Clapton, Middlesex, gentleman, his executors and administrators, desiring him to dispose of the same in such charities as he shall think fit, recommending poor clergymen who have large families and good characters; and I appoint the said John Maggridge and Mr. Vaston, before mentioned, executors of this my will."

In the final decree "upon a motion to vary the minutes, Lord Thurlow declared, that the residue of the testatrix's personal estate passed by her will, and ought to go and be applied to charity," &c.

Now here was a trust created not only in Vaston, but in his executors and administrators, to whom the residue of the estate was bequeathed for the purposes of the charity. In this view, Lord Thurlow might well say, "the residue of the personal estate passed by the will." This was true, though Vaston was dead when the will took effect. This being the case, it is difficult to say that that case is identical with the one before us.

The case of *Maggridge vs. Thackwell* was before Lord Eldon on a rehearing. He entered into a general view of the subject of charities by the citation of authorities, which showed the unreasonableness of the doctrine maintained by the courts, the inconsistencies in the decisions in such cases, and the gross perversions of charities by the exercise of the prerogative power; but at last he says: "Therefore I rather think the decree is right. I have conversed



with many upon it. I have great difficulty in my own mind, and have found great difficulty in the mind of every person I have consulted; but the general principle thought most reconcilable to the cases is, that where there is a general indefinite purpose not fixing itself upon any object, as this in a degree does, the disposition is in the king by sign-manual; but where the execution is to be by a trustee with general or some objects pointed out, there the court will take the administration of the trust. But," he observes, "it must be recollected that I am called upon to reverse the decree of a predecessor, and of a predecessor who, all the reports inform us, had great occasion to consider the subject. I should hesitate with reference to that circumstance; but where authority meets authority, and precedent clashes with precedent, I doubt whether I could make a decree more satisfactory to my own mind than that which has been made."

It will be perceived that this decision was made reluctantly, and after much balancing of the law and the force of precedents, and chiefly, as it would seem, in respect to the decree of Lord Thurlow. This decision of Lord Eldon was made in 1802, and it is not known to have been recognized in this country.

Neither the doctrines on which this decision is founded, nor the doubts expressed by the chancellor, are calculated very strongly to recommend it to judicial consideration. The case, however, is different from the one before us in this: the residuary estate of Mrs. Cam passed to the trustee; that of Mr. Kohne remained as a part of his estate in the hands of the executors, and descended to his heirs at law on the death of Mrs. Kohne. The beneficiaries were not more definitely described in the one case than in the other. In Kohne's case no trust was created, except that which was connected with the executorship.

Where there is nothing more than a power of appointment conferred by the testator, there is nothing on which a trust, on general principles, can be fastened. The power given is a mere agency of the will, which may or may not be exercised at the discretion of the individual. And if there be no act on his part, the property never having passed out of the testator, it necessarily remains as a part of

his estate. To meet such cases, and others, the prerogative power of the king, in England, has been invoked, and he, through the chancellor, gives effect to the charity.

It would be curious as well as instructive, on a proper occasion, to consider the principles, if principles they can be called, which were first applied in England to charities. Their most learned chancellors express themselves, in some degree, as ignorant on this subject. Lord Eldon said, in the case of *Maggridge*, "in what the doctrine originated, whether, as Lord Thurlow supposed, in the principles of the civil law, as applied to charities, or in the religious notions entertained formerly in this country, I know not; but we all know there was a period when a portion of the residue of every man's estate was appropriated to charity, and the ordinary thought himself obliged so to apply it, upon the ground that there was a general principle of piety in the testator."

In the above case, Lord Eldon again says: "In *Clifford vs. Francis*, this doctrine is laid down: that when money is given to charity, without expressing what charity, there the king is the disposer of the charity; and a bill ought to be preferred in the attorney general's name. I cite this (he says) to show that it contains a doctrine precisely the same as the *Attorney General vs. Syderfin*, and the *Attorney General vs. Matthews*. So those three cases (he says) seemed to have established, at the year 1679, that the doctrine of this court was, that where the property was not vested in trustees, and the gift was to charity generally, not to be ascertained by the act of individuals referred to, the charity was to be disposed of not by a scheme before the master, but by the king, the disposer of such charities in his character of *parens patriæ*.

Some late decisions in England, involving charities, evince a disposition rather to restrict than to enlarge the powers exercised on this subject. An arbitrary rule in regard to property, whether by a king or chancellor, or both, leads to uncertainty and injustice.

In a late case of *Clark vs. Taylor*, 21 Eng. Law and Eq., 308, a gift by will to a particular charitable institution maintained voluntarily by private means, the particular intention having ceased:

held that the gift was not to be disposed of as a charitable gift cy-pres, but failed and fell into the residue."

In the case of the Baptist Association, Chief Justice Marshall says, there can be no doubt that the power of the Crown to superintend and enforce charities existed in very early times; and there is much "difficulty in marking the extent of this branch of the royal prerogative before the statute. That it is a branch of prerogative, and not a part of the ordinary powers of the chancellor, is sufficiently certain." And in the case of the *Attorney General vs. Flood*, Hayne's Rep. 630, it is said: "The court of chancery has always exercised jurisdiction in matters of charity, derived from the Crown as parens patriæ."

In the provisions of the act of Pennsylvania defining the powers of a Court of Chancery, in 1836, it is declared, "that in every case in which any Court, as aforesaid, shall exercise any of the powers of a Court of Chancery, the same shall be exercised according to the practice in equity, prescribed or adopted by the Supreme Court of the United States."

In June, 1840, an act extended the jurisdiction of the Supreme Court within the city and county of Philadelphia, in chancery, in cases of "fraud, accident, mistake, or account;" and since then an act has been passed giving the Orphans' Court power, where a vacancy happens in a trust, to fill it, and also power to dismiss trustees, executors, &c., for abuse of their trusts, &c. But no statutory provision is found embracing the case before us.

The chancery powers are of comparatively recent establishment in the State of Pennsylvania, and it does not appear that the cy-pres power is given, and in the exercise of jurisdiction it seems to be disclaimed.

In *King vs. Rundle*, 15 Barber, 139, "there being a number of charitable bequests to several charitable bodies, the remainder was bequeathed or devised to the Protestant Episcopal Society for certain purposes, &c.; the bequests to the religious bodies were held invalid, and so of the remainder over, as not being statutory tests. In *Yates vs. Yates*, 9 Barber, 324, the Court say: "We come to the conclusion, that as a court of equity we possess no original inhe-

rent jurisdiction, to enforce the execution of a charitable trust void in law, as contravening the statute against perpetuities, as being authorized. In this case, where the use is a pious one, additional reasons might be urged against the exercise of such jurisdiction, were it important. Unless this trust will stand the statutory test to be applied to it, it must fall.

In the will of Sarah Zane, Mr. Justice Baldwin, sitting in Pennsylvania, and speaking of trustees, says, "they will be considered as trustees acting under the supervision of this Court as a Court of Chancery, with the same powers over trusts as courts of equity in England and the courts of this State profess and exercise." "When the fund shall be so ascertained as to be capable of a final distribution, it will be directed to be applied exclusively to the objects designated in the will, as they existed at the time of her death, and shall continue until a final decree; if any shall then appear to have become extinct, the portion bequeathed to such object must fall into the residuary fund as a lapsed legacy. Its appointment to other purposes or cestuis que trust than those which can by equitable construction be brought within the intention of the will of the donor, is an exercise of that branch of the jurisdiction of the Chancellor of England which has been conferred on this Court by no law, and cannot be exercised, *virtute officii*, under our forms of government."

And again, in *Wright vs. Linn*, 9 Barr, 433, Bell, J., says: "Though in the statute of 43 Elizabeth, c. 4, relating to charitable uses, has not in terms been recognized as extending to Pennsylvania, we have adopted not only the principles that properly emanate from it, but, with perhaps the single exception of *cy-pres*, those which by an exceedingly liberal construction the English courts have engrafted upon it."

In the *Methodist Church vs. Remington*, 1 Watts, 226, the Court says: "The original trust, though void, was not a superstitious one; nor if it were, would the property, as in England, revert to the State, for the purpose of being appropriated in *eodem genera*, as no Court here possesses the specific power necessary to give effect to the principle of *cy-pres*, even were the principle itself not too

grossly revolting to the public sense of justice to be tolerated in a country where there is no ecclesiastical establishment."

In *Ray vs. Adams*, 8 Mylne & Keen, 237, it was held, "that where a power is by will given to a trustee, which he neglects to execute, the execution of the trust devolves upon the Court; but if, in the events which happen, the intended trustee dies before the time arrives for the execution of the trust, and the trust therefore fails, the testator is to be considered as having so far died intestate.

In the case of *Ommanney vs. Butcher*, 1 Turn. & Russ. 260, a testator concluded his will: "In case there is any money remaining, I should wish it to be given in private charity." *Held*, "if the testator meant to create a trust, and the trust is not effectually created or fails, the next of kin must take."

There appears to be no law or usage in South Carolina that can, materially, affect the question under consideration. It seems to be conceded, that if this charity cannot be administered by this Court in the State of Pennsylvania, it cannot be made available by the laws of South Carolina.

After the investigation we have been able to give to this important case, embracing the English chancery decisions on charities as well as our own, and the cases decided in Pennsylvania, we are not satisfied that the fund in question ought to be withdrawn from those who are in possession of it, as the heirs of Frederick Kohne. There does not appear to us to be any safe and established principle, in Pennsylvania, which, under the circumstances, enables a Court of Chancery to administer the fund. It has not fallen back into the estate of the testator, because it was not separated from it. It remains unaffected by the bequest, because the means through which it was to be given and applied have failed. The decree of the Circuit Court is, therefore, affirmed.

*In the Court of Appeals of New York—In Equity.*

BRYANT BURWELL vs. AMANSEL D. JACKSON.

AMANSEL D. JACKSON vs. BRYANT BURWELL.

1. A covenant "to make a good and sufficient deed of conveyance" is not satisfied by the execution of a deed good in point of *form* only; there is an implied undertaking to make a good title.
2. In an executory agreement to purchase land, the purchaser is not bound to examine the title before entering into the agreement, and if the title prove defective upon examination, the vendee cannot be compelled to take it.
3. The implied warranty of the vendor ceases upon the execution of the deed, as the vendee is presumed to have examined the title and to be satisfied with it.
4. The cases of *Gazely vs. Price*, and *Parker vs. Parmlee*, commented on.
5. The covenants in this case are dependent covenants, and the execution of the deed is a condition precedent to the payment of instalments subsequent to the first.
6. Where the title of a vendor who has covenanted to convey is totally destroyed, the vendee is not bound, either to offer to perform on his part, or to require performance by the vendor, but may treat the contract as rescinded.

On the first day of June, 1835, an agreement was made, under the hands and seals of the respective parties, between James D. Bemis, Pierre A. Barker, John W. Clark, and Roswell W. Haskins, of the first part, and Arenton J. Douglass, of the second part, by which the said Bemis and his associates agreed, that, on the performance by said Douglass of the covenants on his part, they would "execute, or cause to be made and executed, unto the said party of the second part, or his legal representative or representatives, on the first day of June, 1836, a good and sufficient deed of conveyance of a certain lot of land in the city of Buffalo," describing it.

Douglass, the party of the second part, covenanted as follows: "to pay for said lot of land the sum of two thousand five hundred dollars, in ten equal annual payments, with annual interest on the whole sum; the first instalment of the interest which shall then

have accrued to be paid on the first day of June, 1836, at which time, and on delivery of the deed aforesaid, a bond and mortgage for the remaining purchase money shall be executed by the party of the second part, or his legal representative or representatives, payable as above stipulated."

The agreement also contained a provision, that in case of non-performance by Douglass of any of the covenants on his part, Bemis and his associates might re-enter, and that all the rights of Douglass under the agreement should thereupon cease.

The lot described in the agreement was part of a large tract of land, then owned by the parties of the first part, in the city of Buffalo, which tract was subject, at the date of the agreement, to several mortgages, covering the whole or separate portions thereof; and among others, to a mortgage for twenty thousand dollars, given by the said Pierre A. Barker to Mark H. Sibley, for the purchase money of a portion of the said tract. These mortgages were all on record in June, 1835, when the agreement was made.

Prior to June, 1836, the defendant in the original suit, Amansel D. Jackson, purchased the interest of Douglass in the agreement for the sum of one thousand dollars, and took an assignment from Douglass, with the consent of Bemis and his associates.

On the 8th day of June, 1836, Jackson paid the sum of one hundred and thirty-three dollars, in cash, upon the contract, and gave his note for two hundred and ninety-two dollars, which was accepted in full of the first instalment, due June 1st, 1836.

On the 18th July, 1836, the four proprietors, Bemis and others, executed and acknowledged a deed of the lot described in the agreement, and also prepared a bond and mortgage to be executed by Jackson, and left both the deed and the bond and mortgage in the hands of their clerk, where they remained, nothing further having been done in regard to them; and nothing more was ever paid, or offered to be paid, by Jackson, upon the contract.

By some arrangement between the four proprietors, the note of Jackson for \$292 became the property of John W. Clark, who brought an action in his own name, and in May, 1838, recovered a judgment for the amount of the note.

In April, 1838, the four proprietors made a partition among themselves of the whole tract, by which the lot in question was assigned, together with other parcels, in severalty to the said Pierre A. Barker, it being provided by the deed of partition, that the portion so assigned in severalty to the said Barker, should be subject to the said mortgage from him to Mark H. Sibley. The contract with Douglass was also assigned to Barker by the partition deed.

An execution was duly issued upon the judgment against Jackson to the Sheriff of Erie County, where he resided, and returned *nulla bona*.

In December, 1839, the judgment was assigned to the plaintiff, Burwell, for the consideration expressed in the assignment, of one dollar, which was the only evidence of any payment by Burwell.

In 1846, the mortgage from Barker to Sibley was foreclosed by the assignee of Sibley, and the premises, including the lot in question, were sold under a decree of the Court of Chancery, and conveyed by the master to Walter Joy, the purchaser at the sale.

In May, 1847, the plaintiff, Burwell, filed a creditor's bill, being the bill in the original suit, to enforce the collection of the judgment on the note, containing the usual allegations; and in November, 1849, he also sued out an attachment against Jackson, under the provisions of Article 1, Title 1, Chap. 5, Part 2, of the Revised Statutes, for the purpose of collecting the same judgment, upon which the property of Jackson was seized by the sheriff; and in order to secure a discharge of the property, a bond was executed, with sureties, pursuant to the statute, upon which bond a suit was commenced by the plaintiff, Burwell, to which the defendant therein pleaded, and which is still pending.

Three of the original proprietors of the said tract of land, to wit: Barker, Clark, and Haskins, became insolvent as early as 1839 or 1840. The fourth, Bemis, has always been and is still solvent.

Jackson put in an answer to the original bill, setting up as a defence, among other things, the foregoing facts, with the exception of those relating to the suing out of the attachment: and subsequently filed a cross-bill, alleging the same facts, and also the fact



of the issuing and execution of the attachment and the subsequent proceedings thereupon: and praying for a perpetual injunction against the collection of the judgment.

The original and cross suit were referred to a sole referee to hear and decide, who sustained the bill in the original suit, and directed the appointment of a receiver, and an assignment by the defendant in the usual form in that suit, and a dismissal of the bill in the cross suit.

The Supreme Court in the Eighth District confirmed the report, and gave judgment for the plaintiff in the original suit, and for the defendant in the cross suit. From this judgment the defendant in the original suit, and plaintiff in the cross suit, appealed to this Court.

The opinion of this Court was delivered by

SELDEN, J.—This case will be rendered comparatively simple, by considering, first, what would be the rights of the parties, in case the original vendors had retained their interest in the note, and had themselves obtained the judgment and filed the creditors' bill and sued out the attachment in their own names: Because, if the defendant in the original suit would have had no defence as against them, he can have none as against the plaintiff, Burwell. On the other hand, if we arrive at the conclusion, that the defence set up would be good, if the note had been sued and the creditors' bill filed in the names of the four original proprietors of the lot in question, we have then only to see what there is in the case to give to the plaintiff, Burwell, any other or greater rights than the vendors themselves would have had.

Viewing the case in this light, it becomes indispensable in the outset, to put a construction upon the main covenant contained in the original agreement on the part of the vendors. It can never be known which party is in default, until their mutual obligations are ascertained.

The vendors agreed, that on the performance by the purchaser of the covenant on his part, they would "execute, or cause to be made and executed, unto the said party of the second part, or his legal

representative or representatives, on the first day of June, 1836, a good and sufficient deed of conveyance of a certain lot of land, &c." Is this covenant satisfied, by the execution of a deed good in point of form merely, or does it require such a deed as will convey a *good title* to the land sold?

If those obvious principles of natural justice which the law applies to analagous cases, are to be applied to this, it would seem that the question here presented ought not to admit a serious doubt. Upon every sale of a *chattel*, the law implies a warranty on the part of the vendor, that he is the owner of the property and has a right to convey, although nothing whatever is said on the subject.

This is not an arbitrary or accidental rule, but one which rests upon a solid foundation of reason and justice. It is fair and just to presume that a vendor knows the nature and extent of his own right. The vendee has not the same means of knowledge. To require a vendor, therefore, to make good the title to that which he assumes to sell, is simply requiring him to guaranty that he is not committing a fraud.

It is a principle universally recognized by all civilized codes, that whenever a thing sold has some latent defect, known to the seller, but not to the purchaser, the former is liable for this defect, unless he discloses his knowledge on the subject to the latter, before the completion of the sale. The doctrine of implied warranty of title rests upon the same principle. The only difference is, that in case of a defect in title, knowledge by the vendor is *presumed*, but when the defect is in quality merely, the common law requires it to be proved.

It is obvious that the reason upon which this doctrine is based, applies no less to sales of real than of personal estate. Moral writers, and writers upon natural law, make no distinction between the two cases. Cicero de Off. 3, 13; Grotius de Jure, &c., 1, 2, ch. 12, sec. 9. Neither does the civil law. 1 Domat, part 1, book 1, title 2, sec. 10, art. 6, et seq; Pothier on Cont. of Sale, sec. 82, 87, et seq. I think, too, that the common law, notwithstanding the many subtle distinctions and modifications of the rule which it has adopted,

will be found to have adhered, substantially, to this acknowledged principle of right. Some of its earliest rules are based upon it.

Originally, the customary words of conveyance in a deed, amounted to a warranty; as the word *dedi* in a feofment, or *concessi* in a grant for years. Coke Litt. 384, a. This doctrine had its foundation in the principle of implied warranty of title. The words demise and grant in a lease, are still held to import a covenant for quiet enjoyment. *Grannis vs. Clark*, 8 Cow. 36. But the same rule has not been applied to the operative words ordinarily used in the more modern forms of conveyance; and since the case of *Frost vs. Raymond*, 2 Caines, 188, it has been regarded as settled in this State, that, neither the words grant, bargain, sell, alien or confirm, when used in a *conveyance* of real estate, import a warranty. We have a statute, also, which provides that "no covenant shall be implied in any conveyance of real estate." 1 R. S. 738, sec. 140. The practice has now become universal, both in England and in this country, for purchasers to protect themselves by procuring the insertion of express covenants in their deeds of conveyance; and it is found to be most consonant to justice, to apply the maxim *caveat emptor* to such cases, and to require the purchaser to look to his express covenants alone.

But neither this rule, nor the reason upon which it is founded, applies to *executory* agreements to sell and convey lands *in futuro*. In respect to such agreements the principles upon which the doctrine of implied warranty rests, are still applied, as well in England as in this country, with all their force. It has been repeatedly held in England, that a purchaser is never bound to accept a defective title, unless he expressly stipulates to take such title, knowing its defects; and these decisions have been made without any regard to the particular language of the agreement to purchase. They rest upon the principle of implied warranty of title, and can have no other basis. *White vs. Foljambe*, 11 Vesey, 337; *Deverill vs. Lord Bolton*, 18 Vesey, 508; *Waring vs. Mackreth*, Forrest, 129.

It seems never to have been doubted that this was the rule in case of a sale of a freehold, nor of a leasehold, so far as the right

of the vendor to the lease itself was concerned; but it was for a long time a disputed question in England, whether upon a sale of a mere leasehold interest, the vendor was bound to show, not only that he owned the lease and had authority to sell it, but that the original lessor had power to create the term. This question was finally settled by the Court of Exchequer in 1821, in the case of *Purvis vs. Rayer*, 9 Price, 488. In that case it was held, after great deliberation, that if a contract be made for the sale of leasehold property unconditionally, and without a stipulation *in terms*, on the part of the vendor, that he meant to sell *his interest* only, and that he would not warrant the lessor's title, he is bound to show the right of the original lessor to *grant the lease*.

The Lord Chief Baron in this case rests his decision upon the general principle, that *every vendor*, whether of lands or of goods, *impliedly warrants* his title to be good to what he sells; the only question being whether that rule, in case of a sale of a mere leasehold interest, extended to the title of the landlord. He says: "The principle applies to everything; and there seems to me to be no sound reason why leaseholds should be an exception. If an estate of inheritance be sold, *it is admitted on all hands*, that the vendor must produce his title; and why, then, is a purchaser bound to take a lease for a term of years, in equity or honesty, although after he has paid the purchase-money, it may not last an hour."

But it may be said, that this last case, as well as those previously cited, arose in equity, and that it may well be that a Court of Equity would not enforce a specific performance, while at law the purchaser would be bound. There is, however, no doubt that the rule at law is the same as in equity.

The case of *Doe vs. Stanion*, 1 Mees. & Wels., 695, was an action at law. The purchaser in that case was the tenant of the vendor. The agreement to purchase was in the following terms:—"1831, September 2d. Samuel Stanion purchased an estate in the parish of Corbey, bought of Robert Gray, at the sum of £100. Received on account 10*l*. Mr. Robert Gray is willing to let the same lie by paying 4 per cent." This agreement was signed by the parties,

and 10*l.* deposit paid. It was held that there was an implied warranty of title in that case. PARKE, B., in giving his opinion, says: "Is, then, the contract in question a contract of this conditional nature: to purchase for £100, provided a good title should be made and the estate transferred? We conceive that there is no doubt but that it is to be so construed; for in the first place, in contracts for the sale of real estate, an agreement to make a good title is *always implied*, of which the case of *Souter vs. Drake*, 5 Barn. & Adolph. 992, is a strong instance."

The case here referred to by Baron Parke, was an action at law to recover the price agreed to be paid for a leasehold estate. The agreement on the part of the plaintiff, was simply *to assign the lease and deliver up possession*, and this he offered to do; but the defendant refused to pay, because the plaintiff did not show a good title in the *original lessor*. The Court held the defendant right in refusing. Chief Justice Denman says: "For the reasons above given, we come to the conclusion, that, unless there be a *stipulation to the contrary*, there is in every contract for the sale of a lease, an *implied undertaking* to make out the lessor's title to demise, as well as that of the vendor to the lease itself, which implied undertaking is available *at law* as well as in equity."

These cases seem never to have been disputed. They are referred to, and recognized in, the latest editions of Sugden's Law of Vendors, as sound expositions of the law. It is clear, therefore, that in England there is in every executory contract for the sale of lands, whatever may be the language in which the agreement is couched, an implied undertaking to make a good title, unless such an obligation is expressly excluded by the terms of the agreement. In this State, also, the decisions have generally been in accordance with this principle of the common law. *Seymour vs. De Lancey*, 6 Johns. Ch. R. 222, S. C.; 3 Cowen, 445; *Emerson vs. Kirtland*, 4 Paige, 628; *Clute vs. Robinson*, 2 Johns. 595; *Judson v. Wass*, 11 Johns. 525; *Van Eps vs. Corporation of Schenectady*, 12 Johns. 442. The cases of *Gazely vs. Price*, 16 Johns. 267, and *Parker vs. Parmlee*, 20 Johns. 130, are, however, exceptions.

In the first of these two cases the covenant was, "to give the

defendant a good and sufficient deed for the premises;" and the Court held that this covenant was performed by the execution of a deed, sufficient *in point of form*, to convey whatever title the vendor might have. In the other case, the plaintiff had covenanted to execute to the defendant a "good warrantee deed of conveyance of the premises; and it was decided that he was not bound to convey a good title, but simply to execute a deed containing a covenant of warranty.

In *Fletcher vs. Button*, 4 Coms. 396, Judge Ruggles reviewed all these cases; and although it did not become necessary, in that case, to pass definitively upon the principles adopted in *Gazely vs. Price*, and *Parker vs. Parmlee*, yet the learned Judge clearly intimates, that, in his opinion, those cases could not be reconciled either with the previous decisions, or with sound reason. In reference to the case of *Parker v. Parmlee*, he says: "But the reasoning in that case falls short of showing, that a covenant to execute a good and sufficient deed of conveyance, is satisfied by a deed of conveyance which *conveys* nothing."

If the words of such a covenant were to be construed simply according to their grammatical import, without reference to the nature of the contract in which they occur, it might lead to the conclusion arrived at in *Parker vs. Parmlee*. But the authorities to which I have referred, show conclusively that, whatever may be the language of a vendor, in a contract for the sale of lands, the *law implies* an undertaking that he *has*, and will *convey*, a good title. In the case of *Souter v. Drake*, *supra*, the vendor, *in terms*, only agreed that he would *assign the lease, and deliver possession*. He offered to do both: but the Court held that he must show, *in addition* to this, that the *landlord* had a good title. All the cases on this subject which have been properly decided, have been, like this case, based not upon a grammatical or literal interpretation of the language of the covenant, but upon the doctrine of implied warranty, applicable to all cases of sale: in respect to which the rule is the same, in equity and at law.

I have no hesitation, therefore, in holding that, under a covenant like that, in this case, to execute "a good and sufficient deed of

conveyance" of lands, a vendee has a right, if he discover the title to be defective, to refuse to receive it; and this right is not affected by the fact, that the defect might have been discovered at the time of entering into the agreement to purchase, by an examination of the public records. Executory agreements for the purchase of lands are frequently made, under circumstances which afford neither time nor opportunity for a thorough examination; and the purchaser cannot be presumed, prior to entering into such an agreement, to have investigated the title. But, aside from this, a vendee can never *be bound*, as between him and the vendor, to search the records for defects of title. The protection of vendors from the consequences of agreeing to sell that which they do not own, constitutes no part of the object of the recording acts: nor is it any answer to a warranty, either express or implied, that the purchaser might, *by inquiry*, have ascertained it to be false. The reason why the implied warranty on the part of the vendor ceases, upon the consummation of the contract of sale, by the execution of a deed, is not that the vendee is presumed to have investigated the title and discovered the defects, if any there be, but that it is reasonable to require the vendee, in taking a deed, which is a more solemn and deliberate act than entering into a preliminary agreement for the purchase, to protect himself by an express warranty, agreeably to common usage. The defendant, therefore, was not bound to take a title to the lot, subject to the incumbrances upon it, notwithstanding those incumbrances were on record. What, then, in view of these principles, were the respective rights and duties of the parties, under their agreement?

The defendant Jackson, upon making, as he did, the first payment, had a right to require the execution of a deed by the vendors. But in order to put them in default for not executing it, it was incumbent on him to demand execution. So on the other hand, the vendee could not be put in default, for not executing the bond and mortgage, until the vendors had made and tendered their deed.

Neither party ever made any such demand or tender. It is clear, therefore, that at the time when the second instalment became due, neither party could rescind, because neither had a right to treat



the other party as having failed in the performance of his contract. They stood upon an equal footing, and the contract continued obligatory upon both.

Did the non-payment of the second and subsequent instalments then, put the vendee or his assigns in default? Upon the doctrine of some of the cases, this question would be answered in the affirmative. But the case of *Grant vs. Johnson*, 1 Seld., 247, has settled the principle, that covenants, like those in this case, are dependent, and that the execution of the deed is a condition precedent to the payment of the instalments *subsequent* to the first. The vendee, or his assigns, therefore, were never put in default in this case. The consequence of this conclusion is, that his right to demand the execution of a deed, upon payment of the arrearages, continued up to the time of the sale upon the Sibley mortgage.

This sale and the conveyance under it, put it out of the power of the vendors to convey any title to the purchaser. This, of course, under the construction of the covenant which we have adopted, authorized the assignee of the vendee to treat the contract as rescinded, unless it should be held that he was bound still to demand a deed. I consider it settled, however, that no such demand was necessary.

The rule on this subject was laid down at an early day, in *Sir Anthony Main's Case*, 5 Coke, 21, and seems to have been generally adhered to since. In that case, Sir Anthony had given a bond to his tenant to make a new lease at any time, *upon the surrender of the old one*. Being sued upon the bond, he pleaded, that the tenant had not surrendered; to which the latter replied that he, Main, had conveyed away the reversion, and on demurrer, the replication was held good. It is said by Cowen, J., in *Harrington vs. Higgins*, 17 Wend. 376, that this case was never questioned, and he cites a number of cases, in which the same principle was adopted. The case of *Harrington vs. Higgins*, itself, does not conflict with this rule, because the covenants in that case were held to be independent, and because the defendant in that case was guilty of the first default.

I think it may be assumed, therefore, that the law is, that where



the title of a vendor, who has contracted to convey, is totally destroyed, the vendee is not bound, either to offer to perform, on his own part, or to require performance by his vendor, but may at once treat the contract as rescinded.

It follows from this, that upon the sale and conveyance under the foreclosure of the Sibley mortgage, the defendant, Jackson, had an immediate cause of action against the vendors, to recover back the money paid; and of course, that he had a good defence as against them, to any legal proceedings to enforce the collection of the note, given for the balance of the first instalment. "They could have no just right to collect money which they would be instantly bound to refund to the party from whom it was received. No Court, and especially no Court of Equity, would countenance any such claim. It is not a case where the defendant is concluded by the judgment; because the defence did not exist until long after the judgment was recovered. No defence existed until the sale under the Sibley mortgage. Until that event occurred, the vendee had no right to rescind the contract. The vendors had not been put in default by a demand for the conveyance of the lot; and it would have been sufficient for them, if they were able to make a good title when required to convey, which, until the sale they might have done, by paying off the mortgage. This conclusion renders it unnecessary to notice any of the other points made by the counsel.

It remains only to inquire, whether there is anything in the case to give the plaintiff, Burwell, any greater rights than the original vendors themselves would have had. The transfer of the note to Clark, and the recovery of the judgment by him, could not of course change his relations to the maker of the note, as one of the original vendors. The same obligations which rested upon them jointly, rested also upon him individually.

It is very doubtful, therefore, if Burwell were a *bona fide* purchaser for a consideration paid, whether this would give him any greater rights than Clark, the plaintiff, himself had. Possibly, however, as the defence did not exist at the time of the assignment, it might. But it does not appear that he was such a purchaser. The assignment expressed a nominal consideration, merely, of one dollar; and there was no proof that anything was paid.

In the case of *Jackson vs. Caldwell*, 1 Cowen, 622, it was held that it was not sufficient for a party, claiming to be a *bona fide* purchaser, to show a conveyance *expressing* a consideration, but he must go further, and show a consideration actually paid. I think this a just rule. But I do not understand it to be claimed in this case, that Burwell was a *bona fide* purchaser. On the contrary, the case states that he had become *trustee* for Clark; and I infer that he held this judgment in his character as trustee, and not in his own right.

This, under the views already taken, is decisive of the case. The judgment in the Supreme Court must be reversed, and the bill in the original suit dismissed. The prayer of the cross bill, for a perpetual injunction should be granted, and the proceedings remitted to the Supreme Court, with instructions to carry into effect this judgment.

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*In the Supreme Court of Ohio.*

ROBERT DAVIDSON vs. NELSON W. GRAHAM ET AL.

1. A declaration, setting out nothing but a general or ordinary engagement by the defendants as common carriers, is not supported by proof of a contract, containing a special exception of the liability of the defendants for any loss which may arise from "the damage of the river, fire, and unavoidable accident." In such case, the plaintiff must be non-suited on the ground of variance between pleadings and proofs.
2. Such special exception to the defendant's liability may be lawfully created by special contract between the parties, though it cannot be made by general notice, known or unknown to the party engaging the services of the common carrier. The case of *Jones vs. Voorhees*, 10 O. R. 145, explained.
3. Although the common carrier may by special contract restrict his liability, so far as he is an insurer against losses by mistake or accident, he cannot thus exempt himself from losses caused by any neglect of that degree of diligence pertaining to his peculiar character as bailee.
4. The burden of proof, that the loss occurred from one of the excepted causes, rests on the defendant.

This was an action of assumpsit, reserved by the District Court of Muskingum county, on a motion for new trial. The opinion of

the Court, which was delivered by Mr. Justice Bartley, shows the facts and pleadings fully.

*Jewett, Brush & Ball*, for plaintiff.

*Goddard & Eastman*, for defendant.

BARTLEY J.—This suit was instituted to recover damages for the loss of certain goods entrusted to the defendants as common carriers on the Muskingum river. The declaration sets forth an undertaking by the defendants in ordinary and general terms as common carriers and owners of the steamboat "Newark," to transport the goods and merchandise of the plaintiff from Marietta to Zanesville; avers the defendant's failure to deliver the goods according to his understanding, and their loss on the way, by the defendant's negligence.

The defendants pleaded the general issue.

It appears, that on the trial of the cause in the District Court, the plaintiff, after giving evidence tending to prove that the defendants were common carriers between Marietta and Zanesville, and owners of the steamboat "Newark," offered in evidence the bill of lading, which contained the terms of a special contract between the parties, for the transportation of the goods in question, from Marietta to Zanesville, on said steamboat, *specially excepting the liability of the defendants for the dangers of the river, fire, and unavoidable accidents*. But the plaintiff offered no evidence to show "the loss of the goods within the terms of the special contract." The Court directed the plaintiff to be non-suited. The plaintiff excepted to the ruling of the Court, and also moved for a new trial. And the cause was reserved for decision here upon the questions raised by the motion for new trial.

The ruling of the Court below is questionable on two grounds. The first has relation to a question of variance between the proof and the declaration as to the contract between the parties; and the second, to the sufficiency of the proof of loss of the goods.

The declaration sets out nothing but a general or ordinary engagement on behalf of the defendants as common carriers. The evidence offered is that of a contract containing a special exemption of the

liability of the defendants for any loss which may arise from "*the damage of the river, fire, and unavoidable accident.*" It is requisite that a declaration on a contract, should set out the contract truly, either in terms or by its legal import. If the defendants had the right to make this special exception to their ordinary liability as common carriers, it became a *material* stipulation in the contract, and as such, became an essential part of the description of the contract in the declaration. The *materiality*, therefore, of this special provision in the contract, involves the much contested question, *whether the common carrier has the right to limit his common law liability, by special agreement.*

This is a question of great and increasing importance, and requires the most careful consideration. The different branches of business connected with the various modes of transportation have been vastly extended. And not only the facilities and means of public conveyance, but also the actual amount of transportation, have been so greatly increased, that the laws relating to the duties and liabilities of common carriers have acquired far more extensive application than formerly. And it is of the utmost importance that they should be settled with certainty and a just regard to the multiplied and still growing interests to which they relate.

It has been well settled, both in England and in this country, for many years, that a common carrier is liable for all losses which do not fall within the excepted cases of the act of God or the public enemy. The ordinary bailee for hire, or private carrier is liable only for neglect of ordinary care; but the common carrier is held to a higher degree of diligence, and is not only answerable for losses arising from slight neglect, but is in one sense an *insurer* of the property entrusted to him, being responsible for losses by accident or mistake from whatever cause arising, the acts of God and the public enemy only excepted. The loss of, or damage done to, property entrusted to the common carrier, is of itself sufficient proof of negligence; the maxim of the law being, that every thing is negligence which the law does not excuse. The peculiar duty and high responsibility which has been imposed upon the common carrier, arise from the public character of his employment, the

extensive control he exercises over the property of others, and the facilities which he usually has for securing impunity for an abuse of his trust. Kent's Com., Vol. II., p. 597.

But whether the common carrier can limit this liability by *special agreement*, and if so, to what extent, does not seem to be so well settled, and there is much conflict in the decisions upon the subject in England as well as in this country. It was held by the Supreme Court of New York, in *Gould vs. Hill*, 2 Hill Rep. 625, that the common carrier is restrained by public policy from limiting his liability by express agreement. And this doctrine has been recognized, at least, as law by the Courts of several of the other States. *Fish, &c., vs. Ross*, 2 Kelly, (Geo.) R. 349. *Thomas vs. Boston & Prov. Railroad Co.*, 10 Met. (Mass.) R. 479. And in the case of *Jones vs. Voorhees*, 10 Ohio Rep. 145, this doctrine was also recognized in the Supreme Court of this State; but that decision went no further than to decide that the proprietors of stage-coaches are common carriers, and, *as such*, cannot limit their own responsibility by *actual notice* to a traveler, that his baggage is at *his own risk*. The principle really settled in this case we feel no disposition to disturb, but some of the language used in the opinion needs qualification.

Many of the questions which have engaged the attention of courts touching this subject, have arisen upon alleged *implied* contracts, or rather upon the validity and effect of written or printed notices given by common carriers in the course of their public employment, announcing a limitation upon the carrier's liability for property entrusted to him. The validity of such notices was not recognized in Westminster Hall until the decision of the case of *Nicholson vs. Willan*, 5 East, 507, in the year 1804. But the doctrine became gradually and firmly established in England, until Parliament at length interfered, and by statutory provision controlled the effect of these notices, and restored the operation of the common law. Stat. 1 Will. 4, ch. 68. The adjudications in this country have generally shown a firm adherence to the strictness of the common law rule in regard to the responsibility of common carriers, and an inclination to restrict, and, in some of the States, to in-

validate the effect of notices upon that liability. It is held, in Pennsylvania, that although a common carrier may limit his responsibility by a general notice, yet, the terms of the notice must be *clear* and *explicit*, and the person with whom the carrier deals must be *fully informed* of the terms and effect of it. *Camden and Amboy R. R. Co. vs. Baldauf*, 16 Penn. St. Rep. 67. But in New York it is settled that the common carrier cannot restrict his liability by a general notice, even though the notice be clearly brought to the knowledge of the owner. *Cole vs. Goodwin*, 19 Wend. 251; *Hollister vs. Nowlan*, Ib. 235; *Wells vs. The Steam Navigation Co.*, 2 Comst. R. 204. This rule, which has been adopted also in several other States, and by the Supreme Court of the United States, in the case of *The New Jersey Steam Navigation Company vs. The Merchants' Bank of Boston*, 6 How. 344, fully sustains the principle decided in Ohio in the case of *Jones vs. Voorhees*, so far as it relates to the effect of the notice upon the carrier's liability.

The ground upon which the validity or effect of a notice to restrict the liability of a common carrier, is sought to be maintained, is that it amounts to a proposal of special terms in the engagement, and that the assent of the owner or employer will be *presumed* or *implied*. This reason is noticed by Mr. Justice Nelson, in the opinion in the case of *New Jersey Steam Navigation Co. vs. Merchants' Bank*, in the following language: "But admitting the right thus to restrict his obligation, it by no means follows that he can do so by any act of his own. He is in the exercise of a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself without the assent of the parties concerned. And this is not to be implied or inferred from a general notice to the public, limiting his obligation, which may or may not be assented to. He is bound to receive and carry all the goods offered for transportation, subject to all the responsibilities incident to his employment, and is liable to an action in case of refusal. And we agree with the Court in the case of *Hollister vs. Nowlan*, that, if any implication is to be indulged from the delivery of the goods under the general notice, it is as strong that the owner

intended to insist upon his rights, and the duties of the carrier, as it is that he assented to their qualification."

In a matter of this nature, we think, that the *assent* of the owner or employer is not to be *implied*, and cannot reasonably be *presumed* from a notice, in the absence of proof of an express agreement. And we hold it to be settled in Ohio, at least, that the common carrier cannot restrict his liability by notice, verbal, written, or printed, even when brought to the knowledge of the owner or employer.

But the question recurs, where an express agreement between the parties actually exists, restricting the liability of the common carrier, is it wholly invalid? Upon what principle can it be rendered invalid? There is no incapacity in the parties to contract; neither is there any criminal or immoral element entering into the nature of the contract. The particular transaction to which it relates, involving simply the rights of property, and the service of the safe custody, carriage and delivery of goods, contains no element of illegality, and does not, perhaps, so far as that particular instance is concerned, injuriously affect the public interests, any more than the ordinary engagement of an *insurer* of goods, to which, in one respect, the engagement of the common carrier is analogous. But it is said, that a stipulated restriction upon the common carrier's liability, contravenes a principle of public policy—that the common carrier is in the exercise of a public employment, and that to allow him to stipulate for his own carelessness, or by special contract to provide impunity for his own misconduct or omissions of duty, would encourage negligence and open a wide door to fraud, in a business extensively affecting the commerce and interests of the community at large.

The liability of the common carrier, however, extends beyond that of losses by his own default or omissions of duty. He is liable for losses by accident, mistake, and numerous unavoidable occurrences, not falling within either of the two excepted perils, and against which it is not within the reach of human vigilance or foresight to provide. If the loss happen by the wrongful act of a third person; by an accidental fire, not caused by lightning; by the



agency of the propelling power in a steamship; by mistaking a light; by the goods being taken by robbers, or destroyed by a mob through force, which neither the carrier nor his agents could resist; or any other of the many unavoidable circumstances not within the two common law exceptions, the carrier is held liable. In the case of *Riley vs. Horne*, 5 Bing. 217, Mr. Chief Justice Best, in discussing the extent of the common carrier's liability, uses the following forcible language: "When goods are delivered to a carrier, they are usually no longer under the eye of the owner; he seldom follows or sends any servant with them to the place of their destination. If they should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them, or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss. His witnesses must be the carrier's servants; and they, knowing that they could not be contradicted, would excuse their masters and themselves. To give due security to property, the law has, therefore, added to that responsibility of a carrier, which immediately arises out of his contract to carry for a reward, namely, that of taking *all reasonable care* of it, the responsibility of an *insurer*. From his liability as an insurer, the carrier is only to be relieved by two things, both so well known to all the country, when they happen, that no person would be so rash as to attempt to prove that they had happened when they had not; namely, the act of God and the king's enemies."

The liabilities of a common carrier may be distinguished into two distinct classes, according to their nature. The one, a liability for losses by neglect on the part of the carrier or his agents, which is the liability of a *bailee*, arising from omission of duty. The other, a liability for losses by accident, mistake, or other unavoidable occurrence, without any actual fault on the part of the carrier; which is the liability of an *insurer*, and founded upon a principle of the common law. No principle of *public policy* would seem to be contravened by a *special contract* restricting the liability of the common carrier for losses not arising from any neglect or fault on his part. Here he would not be stipulating for his own carelessness, or providing impunity for misconduct or any omission of duty



on his part. And it would appear reasonable that he should be allowed the means of protection to himself against misfortune, by limiting his liability as an insurer. Besides, the owner may prefer selecting his own insurer. The carrier may be unable to respond in case of loss. And if no restriction of this kind on his liability can be made by agreement, the owner would be subjected to the necessity of paying the carrier for his risk as insurer, and also for paying a premium to another for protection against the same loss for which the carrier is liable.

The right of the common carrier to restrict his common law liability by special agreement, is founded upon sound reason, and is fully sustained by the Supreme Court of the United States, in the case of *The New Jersey Steam Navigation Company vs. Merchants' Bank*, 6 How. 344. And the same doctrine is sanctioned by the greater weight of authority in this country and also in England.

The contract of the common carrier, therefore, restricting his liability, is not *invalidated* by public policy, but merely limited in its operation. The common carrier has the right to restrict his common law liability by special contract; and this extends to all losses not arising from his own neglect or omission of duty. He cannot, however, protect himself by contract from losses occasioned by his own fault. He exercises a public employment, and diligence and good faith in the discharge of his duties are essential to the public interests. He is held to extraordinary diligence, that is, that degree of diligence which very careful and prudent men take of their own affairs. And he is responsible for all losses arising from a neglect of that high degree of diligence enjoined on him by his public employment. And public policy forbids that he should be relieved by special agreement from that degree of diligence and fidelity which the law has exacted in the discharge of his duties. All public agents are held to this high degree of diligence in the discharge of their trusts; and they are never allowed to contract for a less degree of diligence and fidelity than that which the law imposes. Any such contract would be regarded as illegal or against public policy, and therefore void. If a public agent can, by special contract, provide that he shall be held to, or made responsible only

for ordinary diligence in the discharge of his duties, he can of course go further, and provide that he shall not be answerable for more than slight diligence, or indeed for any degree of neglect, or the consequences of any misconduct in the performance of his task. The law fixes the degree of diligence required of the common carrier as a public agent, and this he cannot change by special contract. The proposition that he could do so, would imply that a public agent could contract in consideration of his own future malfeasance or nonfeasance in the performance of his trust. The degree of diligence required by law of the common carrier, is a matter over which he has no control, and in which the public is interested.

It has been held, that where the liability of a common carrier has been restricted by agreement, he is to be regarded in respect to that particular transaction, as not in the exercise of his public employment, but as an ordinary bailee for hire, and, therefore, liable only for a neglect of ordinary diligence. The reason upon which this opinion rests is not satisfactory. It is not true that the character of the employment is changed by such contract, and the carrier is not and cannot in fact be regarded as a mere private bailee for hire. He is still a common carrier, and not at liberty to refuse to perform his duties *as such*, even in regard to the particular transaction to which the contract relates.

In consequence of the nature of his employment, and its connection with the public interests, the common carrier is held to a higher degree of diligence than the private carrier. And he cannot be allowed, with proper regard for the public safety, to relieve himself to any extent from that care and diligence which has been enjoined upon him from considerations of great public interest. We are unanimous in holding that the common carrier cannot relieve himself to *any extent* by special contract, from losses occasioned by his own neglect; and that, although he may, by contract, restrict his liability as an *insurer*, yet that he cannot stipulate for a less degree of care and diligence, in the discharge of his duty, than that which pertains to his peculiar trust as a bailee.

The special stipulation in the contract offered in evidence in this

case, was, therefore, *valid* and *material*, and should have been set out in the declaration as part of the contract. Upon this ground there was a fatal variance between the proof and the declaration.

2. On the subject of the sufficiency of the proof of the loss of the goods in this case, the facts do not appear as fully as desirable. It seems, however, that the delivery of the goods to the defendants and the non-delivery of the same at the place of destination were not in dispute, and were admitted by the parties on the trial. And by the statement, that "the plaintiff offered no evidence to show the loss of the goods within the terms of the special contract," we understand is meant, that he offered no evidence to show that the loss did not fall within the special exceptions to the defendants' liability in the contract. The question which arises, therefore, is, whether it is incumbent on the owner of the goods, in case of exceptions to the liability of the common carrier by special contract, to prove that the loss did not fall within the exceptions.

The rule of evidence which is applicable here, has been very clearly and definitely settled. Proof that goods entrusted to a common carrier have never been delivered, either to the bailor or to the consignee, is *prima facie* evidence of loss by negligence, and sufficient to charge the carrier. In all cases of loss, the *onus probandi* is on the carrier to bring his liability within any *special exemption*; for it is said, that *prima facie*, the law imposes the obligation of safety on him. Angell on the Law of Carriers, sec. 202; Story on Bailments, sec. 529. Mr. Greenleaf, in his work on Evidence, vol. 2, sec. 219, says: "In all cases of loss by a *common carrier*, the *burden of proof* is on him, to show that the loss was occasioned by the act of God or by public enemies. And if the acceptance of the goods was *special*, the burden of proof is still on the carrier, to show, not only that the cause of the loss was within the terms of the exception, but also that there was, on his part, no negligence or want of due care. Thus, where goods were delivered on board a steamboat, and the bill of lading contained an exception of 'the dangers of the river,' and the loss was occasioned by the boat's striking on a sunken rock; it was held incumbent on the carrier to prove that due diligence and proper skill were used to

avoid the accident." This doctrine is founded on sound reason and fully sustained by authority. *Whiteside vs. Russell*, 8 Watts & Serg. 44.

In this case, therefore, the burden of showing the loss to have been produced by a cause falling within the exceptions rested upon the defendants. The non-delivery of the goods by the defendants according to the bailment, was sufficient *prima facie* evidence on the part of the plaintiff.

Upon the ground of variance, however, between the proof and the declaration, the District Court was correct in its ruling. The motion for a new trial is, therefore, overruled.

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*In the Supreme Court of Pennsylvania.*

CHILDS & CO. vs. DIGBY.<sup>1</sup>

The goods of a non-resident debtor, in the hands of a person residing in this State, are liable to be held by a writ of foreign attachment, although the goods themselves are in another State.

**Error to the District Court of Allegheny County.**

This was a foreign attachment issued against Thomas Scandrett, December 17th, 1851, in which William Digby, the defendant below and in error, was made garnishee. The writ was served upon the garnishee, December 18th, 1851. Judgment by default was rendered against the defendant, Scandrett, and the plaintiffs proceeded to trial against the garnishee, on the plea of *nulla bona*.

On the trial, the following facts were established by the evidence: For two years prior to November, 1851, Thomas Scandrett had carried on a clothing store at Youngstown, in the State of Ohio. William Digby had furnished him goods, in pursuance of an agreement under seal, dated September 27th, 1849, in which it was stipulated, that, if at any time Scandrett should be indebted to Digby, it should be lawful for said Digby to enter the said

<sup>1</sup> We are indebted to the Pittsburg Legal Intelligencer for this case.—*Eds. Am. L. Reg.*

store, and take such portion of the *goods sold by him* to Scandrett, as would be sufficient to satisfy his claim. In July, 1851, Scandrett left his store in charge of a salesman, with instructions to carry on the business, and went on a trading expedition to Lake Superior.

On the 21st day of November, 1851, the stock in the store consisted of a large amount of goods purchased from Digby, and other goods purchased from other persons; which other goods were valued at \$689 26. On that day, Digby, by virtue of the agreement above recited, took into his possession all the goods purchased from him by Scandrett, and the salesman delivered to him the balance of the stock, amounting to \$689 26, and executed a chattel-mortgage for it, to secure the balance of his claim, which was considerably more than the value of the entire stock. No authority was shown to the salesman to execute the mortgage, or dispose of the entire stock at wholesale. In April, 1852, after the service of the foreign attachment, Scandrett ratified the act of his agent, the salesman, considering it the best thing that could be done.

The Court below, WILLIAMS, Assistant Judge, charged the jury that the matter and thing attached must be in the power and jurisdiction of the Court, and referred to the case of *Christmas vs. Biddle*, and that the attachment would not lie. After a verdict in favor of defendant, this instruction was assigned for error.

*Shaler & Co.*, for plaintiff in error, cited several authorities to show that the salesman exceeded his powers, and that his act did not convey the property in the goods to Digby, 2 Harris, 105; 18 Johns. 362. There was no question made as to the goods which Digby had sold to Scandrett. The question whether the goods were bound by the writ, depended on the construction of the law regulating foreign attachments.

*Todd and Smith*, for defendant in error, cited Story's Conf. Laws, § 539; 1 Harris, 223.

The opinion of the Court was delivered by

LEWIS, J.—The observation of Mr. Justice Coulter, in *Christmas vs. Biddle*, 1 Harris, 223, that the attachment process is a

proceeding *in rem*, and the matter and thing attached must be in the power and jurisdiction of the Court, must be taken with some qualification. It is true, that "the attachment process is a proceeding *in rem*;" but, it is equally true, that it is something more. It is also a proceeding against the garnishee, *personally*, for the purpose of compelling him to answer for the value, where the thing itself is not produced. The summons, the judgment and the execution, contain the bones and sinews of a proceeding *in personam*, against the garnishee, by means of which his own estate may be taken in execution, if he fail to "answer interrogatories," or "to produce the goods and effects of the defendant" found to be in his hands or possession, or "neglect to pay the debt attached, if the same be due and payable." The ultimate object of the proceeding is to appropriate the debtor's assets to the payment of his debts, and this object is one which ought to be favored. It may be accomplished wherever the courts have jurisdiction over the person who has the actual possession of the property, and the power to dispose of it according to their direction, or wherever the property itself may be taken into actual possession by the officers of the law. Real estate follows the law of its *situs*, and bank stock that of its creation. Where the one is located in a foreign jurisdiction, or the other created by a foreign law, neither is the subject of attachment here in the hands of one who has neither possession, nor title, but simply a naked power to sell. *Christmas vs. Biddle*, 1 Harris, 223. But this is not the case with ordinary goods and effects. In general, any one having possession of goods or effects, may surrender them in obedience to a judgment in a foreign attachment, although they may happen to be within a foreign jurisdiction at the time the writ was issued. The possession of them gives the power of removal and surrender. While this exists in the garnishee, there is no reason why he should not be compelled to exercise it in furtherance of the object of the law, and in advancement of justice. It was thought, at one time, that a foreign attachment would not lie on a debt contracted out of the jurisdiction. 2 Show. 873; Lord Raym. 346. But this was afterwards denied, and it was held that the debt always follows the

person of the debtor, and it is not material where it was contracted. *Andrews vs. Clarke*, Carthew, 25. In personal property the *lex loci rei sitæ* is not to be recognized. All that is required to sustain the proceedings against the garnishee, is, that he be within the jurisdiction of the Court when the writ was served, and that the property attached be in his hands or possession." The Court was in error, in directing the jury that the attachment would not lie for goods delivered to Digby in Ohio.

This disposes of the only point determined by the District Court; but, as the cause goes back, it is proper to express our opinion on the other points. A stranger has no right to object that an agent exceeded his power, 5 Johns. R. 44. But, where an agent exceeds his authority, and an interest has attached in favor of another, a subsequent ratification will not divest such interest, 5 East, 491. Where an agent exceeds his authority, the principal is bound to disavow it the first moment the fact comes to his knowledge, or he makes the act his own, 14 S. & R. 27. The first, second and third points ought to have been answered in the affirmative.

As we do not see how an affirmative answer to the fourth would have sustained the attachment, or otherwise have benefited the plaintiff, it was not error to refuse to answer it. If Digby is chargeable with the goods as assignee in trust for creditors, the present is not the form of proceeding in which that trust can be enforced.

Judgment reversed, and *venire de novo* awarded.

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*In the Supreme Court of Pennsylvania.*

PHILLIPS ET AL. vs. DUNCAN.

Where a Mechanic's lien was filed for materials furnished at different dates within two years prior to the filing of the claim, it was held, that in the absence of a special contract, no recovery could be had on the scire facias, except for materials furnished within six months prior to the filing of the lien.

Error to District Court of Allegheny county.

This was a scire facias sur mechanics' lien filed for materials furnished during the year 1850 and 1851. On the 2d of May 1854,

a verdict was rendered for the plaintiff below and defendant in error, for the whole amount of his claim, subject to the opinion of the Court upon the question, whether the lien filed in this case is sufficient to entitle the plaintiff to recover; and also, whether the plaintiff is entitled to recover for the items of lumber and materials furnished more than six months before the filing of the lien. And if the Court should be of the opinion, that the law is with the plaintiff on both questions, then judgment to be entered in his favor upon the verdict. If the Court should be of opinion that the law is with the plaintiff on the first point and not on the second, the judgment to be entered in favor of the plaintiff for the sum of \$26 56, with interest from August 2, 1851; but if the Court should be of opinion that the law is with the defendants, then judgment to be entered in their favor, *non obstante veredicto*.

The Court rendered judgment for the plaintiff below on both points.

Two errors were assigned, the first to the insufficiency of the description, which is set forth distinctly in the opinion of the Court. The second was to the entry of judgment for items which were furnished more than six months prior to the filing of the lien.

The case was argued by

*Darrah and Mellon* for plaintiff in error, and by

*C. Hasbrouck, Esq.*, for defendant in error.

The opinion of the Court was delivered by

WOODWARD, J.—The first error assigned is not sustained. The lien is sufficiently certain. In *Barclay's Appeal*, 1 Harris, 495, there was nothing on record to show to what buildings the materials furnished, were applied. Here there is. We have a bill of specification, charged to have been furnished for two certain two-storied brick houses, (particularly described) with the ground on which they stand, and said to belong to *Elias Phillips*, and *Mary* his wife. This individuates the buildings with reasonable certainty, and that is all the act of Assembly requires.

But the second error is, we think, well assigned.

The account filed shows that of the materials furnished, \$25 58 worth only were supplied within six months before the lien was en-



tered—all the rest were furnished beyond that period. Where materials are furnished under a *special contract*, as for the brick or lumber of a particular house, the lien may be entered within six months after the delivery of the last items, for that is the completion of the contract, (7 Harris, 341); but a contractor who goes to a lumber merchant, and obtains lumber as he needs it for the job in hand, makes a new contract at each purchase, and the statute bars all of the account more than six months old at the filing of the lien. Such seems to have been the case here. No special contract was shown, and there is no allegation that all the materials were furnished within the six months, as in 2 Harris, 56, and *ibid.* 167. The copy of the account filed shows that they were not, and, therefore, for so much of his claim as represents materials furnished before that period, the plaintiff ought not to have judgment.

The judgment is reversed, and judgment is entered here for the plaintiff for \$25 53, with interest from 1st July, 1854, and costs.

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*In the Supreme Court of Texas.*

MIGUEL YENDO ET AL. vs. JESSE WHEELER ET AL.<sup>1</sup>

1. Where land is sold under a tax-law, it is necessary that every pre-requisite in the statute should be strictly complied with; otherwise, the purchaser under the tax-sale will take no title.
2. An assessment to be valid under the Texas statute, with a view of collecting the taxes, must embrace a true description of the land, together with the name of the actual owner, whether resident or non-resident, and such other descriptive matter as will apprise the owner that his land is about to be sold for taxes.

The opinion of the Court, in which the facts appear, was delivered by

WHEELER, J.—The plaintiffs brought their action of trespass to try title to a league of land. They claimed as heirs of Manuel Yendo and his wife, Casiana Zambrano, under a title issued by the Commissioner of De Leon's colony, in 1833. The defendant

<sup>1</sup> This case has been kindly furnished us by a professional friend in Galveston, Texas, who assures us that the subject discussed is of much practical importance to our subscribers in that section of the Union.—*Eds. Am. L. Reg.*

claimed under a purchase made at a sale of the land for taxes, in 1850. The plaintiffs gave in evidence the grant to Zambrano, and proved that they were the heirs of the grantee, and that her husband, Manuel Yendo, died in 1828 or 1829. The defendants introduced, as evidence of titles in themselves, the deed of the assessor and collector of the county, bearing date on the 22d day of August, 1850, made in pursuance of a sale for the taxes for the year 1849. The deed recites the levy was made "upon the following property of the said M. Yendo, to wit: 4428 acres of land lying and situated on the Garcitas creek, adjoining the land of R. Rios and F. De Leon, as will appear by reference to the map of the county of Victoria." The deed purports to convey "all the right title and interest of the said M. Yendo, or of any other owner or claimant of the same unknown, under him, in and to the above described premises." The assessor testifies that he sold the land as the property of M. Yendo, a non-resident delinquent tax payer, from information derived from the map of the county. That the land was marked on the map as belonging to M. Yendo, and did not appear, by the records, to be claimed by any one else. He further testified, at the instance of the plaintiffs, that he levied on the land, by virtue of his tax list, of which he had three copies, that he had a rough draft of the non-resident delinquent tax payers, not on his alphabetical list, but on a separate piece of paper; that these three rolls were not exact copies of this list; that he had forwarded to the proper office at Austin one of the copies, and had deposited one in the county clerk's office, retaining one himself; he did not recollect, whether he had kept or destroyed the rough draft. The plaintiffs objected to the introduction in evidence of the assessor's deed, but their objection was overruled. After the assessor had given his testimony, they moved the court to exclude the deed, which the court refused. The plaintiffs asked, among others, the following instructions, which were refused by the court, viz: "That the requirements of the assessment law must be strictly complied with, and that any material variance therefrom, when proved, is fatal to a deed made by virtue of a tax sale. 2d: That where it is shown that the assessor failed to state in his assessment roll the number of acres and the patentee or person

for whom the original survey was made, it is a fatal defect in the sale made under such assessment." There was a verdict for the defendant, a motion for a new trial overruled, and judgment on the verdict; and the plaintiffs appealed.

The question to be determined is as to the validity of the title of the defendants, acquired by their purchase at the sale of the land for taxes. To vest a title in the purchaser, the officer must have the power to sell, and the requirements of the law must have been complied with in making the sale. The authority of the officer to sell land for the non-payment of taxes, under the laws conferring the authority, is, in the language of the court in *Williams vs. Peyton*, 4 Wheat. 77, "a naked power, not coupled with an interest; and in all such cases the law requires that every pre-requisite to the exercise of that power must precede its exercise, that the agent must pursue the power, or his act will not be sustained by it." This principle was recognized in the case of *Hadley vs. Tankersly*, 1 Texas Rep. And it was held that under the act of 1840 which did not make the deed prima facie evidence of the regularity of the sale, the party claiming under it must prove that all the pre-requisites of the law had been complied with in making such sale." This statute does not dispense with a compliance with the requirements of the law by the officers, or relieve the purchaser from the effect of a non-compliance; but only changes the burden of proof from the purchaser to the party impeaching his title; it is as necessary to the validity of the title now as it was, before this statute was enacted, that all the pre-requisites of the law should have been complied with. The principle, that the officer must exercise his authority strictly in conformity to law or his act will be invalid and will vest no title in the purchaser, is not affected by the statute. But it makes his deed prima facie evidence of the regularity of the sale, and throws upon the party impeaching the title of the purchaser, the necessity of proving that the requirements of the law were not complied with in making the sale. A distinction has been taken by counsel for the appellant between the power to sell, and the regularity of the sale; and there, manifestly, is a clear distinction. The proceedings in making the sale may be regular, and the sale inef-

fectual to pass the title for the want of power in the officer to make it. This distinction has been recognized by the Supreme Court of New York, in the cases cited by counsel; and it is there held, that the statute of the State, which makes the deed conclusive evidence of the regularity of the sale, and declared that it shall vest in the grantee an absolute estate in fee simple, applies only to the proceedings to be had, after the right and power to sell are acquired. 2 Comstock, 66; 18 Johns. 441. To empower the assessor to sell, there must have been a legal assessment of the taxes, and a failure to pay them; and there are other provisions of the law which must have been complied with, before the right and power to sell will have been acquired. Hart. Dig. arts. 3133, 3136, 3137, 3138, 3150.

It is not necessary here to determine, whether the assessor's deed is *prima facie* evidence under the act of 1848, before cited, of the existence of those facts, or that the requirements of the law were not complied with; and the decision of this case turns upon the inquiry, whether the evidence establishes such non-compliance with the requirements of the law. That it does, will, we think, be apparent by a comparison of the provisions of the law with the acts done by the officer in one or two essential particulars. The statute provides that all property shall be assessed "in the name of the owner, if known, and if not, then it shall be assessed by a description of the property; if lands, it shall be described by the number of the tract, quantity of acres, and to whom patented." Hart. Dig. art. 3137. The statute thus plainly requires that the land shall be assessed in the name of the owner, if known; but if he be unknown, it must be assessed by a description of the land. It provides what that description shall contain, and one of its essential constituents is the name of the grantee. The assessment in this case was made in the name of the supposed owner, M. Yendo. This, however, was a mistake. Manuel Yendo was neither the owner nor the grantee. He had died several years before the grant was made. Casiana Zambrano was the grantee, and the owners were her heirs, the present plaintiffs. It is manifest, therefore, that the land was not assessed, either in the name of the

owner, or by such a description as the statute requires; that it is one embracing, among many other particulars mentioned, the name of the grantee. That it should have been in the one mode or the other, clearly was necessary to the validity of the assessment. It may be said that it was the fault of the plaintiffs, that their title was not recorded in the county; and it is true that it should have been so recorded. But if this afforded an excuse for not knowing who the owners were, it afforded none for not giving a correct description of the land by the name of the grantee. This could have been easily ascertained by reference to the abstract of original titles. The owners are not accountable for mistakes made in the county map, in causing which they had no agency. The statute further requires of the assessor to make out "three descriptive lists of all taxable property in his county, on which the taxes remain unpaid, belonging to non-residents, who shall be named, if known; if unknown, shall be so described: one of which lists shall be filed in the office of the clerk of the county court of his county. Another shall be posted at the court-house door of said county, and the other shall be transmitted to the comptroller of the public accounts. Ibid. art. 3150. The assessor testifies that he made out three copies of his tax-list, one of which he forwarded to the proper officer at Austin, and one he deposited in the county clerk's office, retaining the other himself. It appears, therefore, that instead of posting up one copy at the court-house door, as the law required, he retained it in his possession. This was a material departure from the requirement of the law; one object of which was to apprise the owner that his land was to be subjected to sale for the taxes, and to afford him an opportunity of preventing the sale by prompt payment. In the case of *Zallman vs. White*, 2 Comstock, 66, a case in point, the Court of Appeals of New York held this language: "An accurate designation or description of the land assessed is essential to the validity of the assessment. The assessment of non-residents' lands is made with the ultimate view of collecting the tax, by advertisement and sale of the land, if it should not be voluntarily paid. The controller's sale is a rigorous proceeding. It divests the owner of his title

without his consent, and often for a very trivial consideration; and the Legislature has, therefore, shown a cautious solicitude that it should not be done without his knowledge." The assessment must contain a true description of the land, in order that the purchaser may be enabled to know what land he is purchasing, and that the owner may know, from the advertisement required to precede the sale, that his land is exposed to sale, and that he may save it by paying the tax. If the land be misdescribed in the assessment, it will, of course, be misdescribed in the controller's and county clerk's offices, and in the notices and advertisements. The mistake and falsity of description in the assessment necessarily runs through, and invalidates all the subsequent proceedings. In the case cited, it was said: "An assessment of non-resident land is fatally defective and void, if it contains such a falsity in the designation or description of the parcel assessed as might probably mislead the owner, and prevent him from ascertaining by the notices that his land was to be sold or redeemed. Such a mistake or falsity defeats one of the obvious and just purposes of the statute, that of giving to the owner an opportunity of preventing the sale by paying the tax."

It is obvious that the misdescription of the land in this case was calculated to mislead. It is not to be supposed that an advertisement of the land of M. Yendo, would apprise those claiming title under a grant to Casiana Zambrano, that theirs was the land intended. To hold their title divested by a sale under such circumstances, would be to defeat the manifest intention of the Legislature, in the various provisions made to protect the right of the owner of land liable to be sold for the non-payment of taxes. But if the title were not obnoxious to this objection, there is another which must be held fatal to the right of the defendant, under his deed from the assessor. The deed professed to convey only the "right, title and interest of M. Yendo, or of any other owner or claimant of the same, unknown, under him." If the deed had assumed to convey the title of the unknown owner, without reference to its derivation, or the person under whom he claimed, and the proceedings had been otherwise regular, it might have been

effectual. But when the officer has thus undertaken to convey a particular title, and the purchaser takes the title so conveyed, none other will pass by the deed. That manifestly conveys only the title of M. Yendo, and those claiming under him. But the plaintiffs do not claim under Manuel Yendo, and consequently the deed does not profess to convey to the purchaser their right.

We conclude that the assessor's deed was inoperative to divest the plaintiffs of their title; not only because of the invalidity of the assessment, but because the deed did not convey the title of the plaintiffs, and consequently that the court erred in excluding it from the jury. The court also erred in refusing the instructions asked by the plaintiffs, and in overruling the motion for a new trial.

The judgment must therefore be reversed, and the cause remanded.

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#### LEGAL MISCELLANY.

#### LEGAL PRINCIPLES.

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#### No. IV.

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It will give us a clearer view of some of the foregoing propositions, to look at them in the light of one or two cases. Perhaps we cannot better illustrate the truth, that what a judge says, in pronouncing an opinion, is not strictly authority, nor always reliable, though his legal conclusion be correct, than by the leading case on the proof of marriage, *Morris vs. Miller*, 4 Bur. 2057; 1 W. Bl. 632. This was an action for criminal conversation; and it became necessary, therefore, for the plaintiff to establish his marriage to the lady, with whom the illicit intercourse was alleged to have been committed by the defendant; and the point decided was, that evidence of matrimonial cohabitation and repute was not sufficient, but that what is called a marriage in fact must be proved. The same conclusion has been arrived at by every court, English and American, that has ever had occasion to decide the question, down to the present day. It is, correct, beyond all doubt. The



same rule prevails in indictments for adultery, polygamy, and the like; but in other cases, generally, the marriage is sufficiently proved, *prima facie*, by evidence of cohabitation and repute.

The reason of the distinction is obvious. The law always presumes, that every man leads an innocent and moral life, unless the contrary be shown in the particular case. If, therefore, two persons are living together as husband and wife, professing and reputed to be married, the law, which must of necessity presume, either that they are in fact married, or else that they are criminal and immoral persons, adopts, *prima facie*, the former conclusion; that is, regards them innocent. But, in an action for criminal conversation, the plaintiff's own claim is, that both he and defendant have been holding a commerce with one woman, such as could be innocent in neither out of the matrimonial connection. This being proved, both parties cannot be innocent; and so the law must hold its judgment, that is, its opinion which of them is married, in suspense, until some controlling evidence is introduced. The same reasoning applies in indictments for adultery and polygamy.

Now, in stating the opinion of the court in *Morris vs. Miller*, Lord Mansfield, if we may rely on the reports we have of his observations, said, that if the evidence of cohabitation and repute, *which proceed from the party's own act*, were taken as sufficient, it "might render persons liable to actions founded upon evidence made by the persons themselves who should bring the action." This remark, of a most learned and accomplished judge, true in itself, yet not of the smallest possible consequence—a fact, but not a legal reason—has since been mistaken by numerous judges, and, as far as our observation has extended, by all the text writers on evidence, for the principle on which these adjudications proceed. But how do we know this is not the principle, when so many men have said it is? Simply by the fact, that in all issues, where the difficulty we stated above does not intervene, the law permits a party to prove his own marriage by his own cohabitation. And where the issue, of married or not, arises in the trial of indictments for polygamy and adultery, and so the cohabitation is the act of him *against* whom it is offered, it no more establishes his marriage,



than if he were *himself to offer* the evidence in an action against a third person for criminal conversation. All this appears, too, in the very case of *Morris vs. Miller*, if we are to take observations of judges for law; for there, it is also said, that evidence of cohabitation and repute is sufficient in all cases, but indictments for bigamy, and actions for criminal conversation.

If we were to enter upon a course of fault-finding with judges, living and dead, we might blame them for saying so many things that are not law; but a more considerate view will show us, that the full force of their minds is directed to arriving at right *results*; and that it is too much to ask of them, that everything they say should be said with the precision which ought to attend the text of an elementary author. But the writers of law treatises should be more careful; they have not the excuse which judges have, and they are understood to aim at greater exactness. They would exercise more care than sometimes they do, if it were not for the too prevalent, erroneous opinion, that they are entitled to shelter themselves behind the words of great judges.

J. P. B.

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#### SELECTION OF RECENT ADJUDGED POINTS IN EQUITY.

*Account of Back Rents—Possession against Infant.*—As a general rule in cases of adverse possession, where there is no trust, no infancy, no fraud, no suppression, but a mere bona fide possession, it is not the course of the Court of Chancery to carry back the account of rents beyond the filing of the bill. *Pulteney vs. Warren*, 6 Ves. 93; *Edwards vs. Morgan*, 1 M'Clel. 541. Whoever enters upon the estate of an infant, is held to have entered *as bailiff or guardian*, and the subsistence of the relation thus created by the entry, draws with it the right to a back account from the time of the entry into possession, though by mistake. *Drummond vs. The Duke of St. Albans*, 5 Ves. 433, may be considered as overruled. *Hicks vs. Sallitt*, 3 De Gex, Mac. & Gord. 782.

*Husband and Wife—Equity to a Settlement—Husband Foreigner domiciled abroad—Domicil whether material.*—In this case a motion was made before Sir J. Stuart, V. C., that a sum of £2,623 11s. 11d., which had, in an administration suit, been carried to the separate account of a married lady—a German domiciled with her husband at Frankfort—should be paid to her husband. An affidavit was produced, to the effect that no settle-

ment had been executed on the lady's marriage; and also an affidavit of a professor of law in Frankfort, that, in the absence of a settlement, the husband, according to the law in force there, was entitled to the fund. His honor, however, refused to make the order, and observed, that "the evidence only showed, that the rights of the husband, according to the law of Frankfort, were the same as the rights of the husband, according to the law of England. The wife's equity to a settlement was an indulgence allowed by the practice of this court, in derogation of the legal rights of the husband. The evidence of the legal rights of the husband, according to the country of the domicile, had nothing to do with it."

With due deference, however, to the learned Vice Chancellor, the analogy between the merely legal rights of an English husband, and the rights of a foreign husband, seems scarcely to hold good; because, in England, justice, as administered by Courts of Equity, forms part of the law of the land, but not part of the law of other countries; unless, therefore (as is not the case), the law of England is applicable to the personalty in England of foreigners domiciled abroad, the analogy fails in a most material point. However, both by the practice of the court, and by the well-known principles of general jurisprudence, as no settlement had been made, and as, according to the law of the domicile of the husband, the personalty in question would have belonged to him, the order for payment to the husband ought to have been made. For the practice, the reader is referred to *Sawyer vs. Shute*, 1 Anst. 63; *Campbell vs. French*, 3 Ves. 323; *Dues vs. Smith*, Jac. 544; *Anstruther vs. Adair*, 2 My. & K. 513; and *Hitchcock vs. Clendinen*, 12 Beav. 534; and Mr. Macqueen's valuable book on the Law of Husband and Wife, p. 79. As to the general principles upon which courts of justice deal with moveable property belonging to persons having a foreign domicile, the reader is referred to extracts from the very learned judgment of the Lord Justice Knight Bruce, when Vice Chancellor, in the case of *Guepratte vs. Young*, *infra*, next case, which exhaust the subject: one passage of Boullenois, cited by his lordship, at once disposes of the remark of the Vice Chancellor, "that the legal rights of the husband, according to the country of the domicile, had nothing to do with the question." It is as follows: "Bona mobilia sequi et regulari debent secundum statuta loci domicilii ejus ad quem pertinent vel spectant." *Schwabacher vs. Becker*, 2 Smale & Giff. Append. 6.

*Husband and Wife—Reversionary Interest in Personalty of a Woman married to a Foreigner domiciled abroad—Contract respecting, by what law governed.*—A contract was entered into in England, by a married

woman, *domiciled in France*, respecting her reversionary interest in trust money invested in the English Funds, which was invalid, according to the English law, on account of the property being reversionary; and although the same objection did not apply to the substance of the contract by the French law, it was not entered into in the manner prescribed by the French law, which requires that there should be as many original instruments as there are distinct parties to the contract. It was, however, held by Sir J. L. K. Bruce, V. C., that the French law gave capacity to the married woman to enter into the contract, but that the English law regulated the form of it, and that therefore the contract was valid, and ought to be enforced by decree. "Under the kings of France," said his honor; "in the seventeenth and the earlier part of the eighteenth century at least, it was I believe, a general rule of French law (at least as to moveables), that '*la loi du lieu où se passe chaque acte en régit la forme*,' or, in the shorter Latin phrase, *locus regit actum*. Of this there seems no room for reasonable doubt. The maxim was frequently brought into action by the different laws or customs under which different parts of the kingdom were,—those of Poitou, for instance, differing from those of Brittany; those of Champagne widely differing from both; while many proprietors having residences and estates in two or more provinces, were often at Paris, where a system of its own prevailed. The rule, however, I apprehend to be one, not merely of French or of English law, but one of jurisprudence (in the largest sense, at least so far as moveables and merely personal obligations are concerned), nor applied merely where there is the intervention of public functionaries, with reference to which it is not necessary to allude, as an instance, to the acknowledged validity of a marriage contracted in Scotland between persons domiciled elsewhere, in a manner allowed by the law of that country. There may be exceptions from special reasons in particular countries. The English law, for instance, with respect to wills of moveables, may be among them. But the existence of the rule, as a general canon of jurisprudence is, I conceive, incontrovertible. My opinion is, I repeat, with those who treat the 1325th article of the French Civil Code as not barring or obstructing it. In the words of Modestinus,—'*Nulla juris ratio aut æquitatis benignitas patitur, ut quæ salubriter pro utilitate hominum introducuntur, ea nos duriore interpretatione contra ipsorum commodum producamus ad severitatem*.' I am convinced by the evidence before me, that if a French citizen, capable by the French law to contract, who is residing temporarily, but not domiciled in a country not his own, makes in that country, with a person there domiciled, a contract relating to

moveables, and the contract is made in such a form, and accompanied with such ceremonies (though private only) as to render it valid and binding, according to the law of that country (applicable to persons whose capacity to contract that law recognizes), the contract binds the Frenchman wherever the moveables may be. But especially if, when the contract was made, the moveables were in the country where it was made, and this, though the contract be a synallagmatic contract, and the requisitions and conditions of the 1325th article be omitted and disregarded, the agreement would, therefore, if made in France, not have bound him. The proposition assumes, of course, a capacity to contract on the part of each of the contracting parties—assumes the fairness of the contract, and assumes that it does not infringe good morals, or the law, or public policy of either country; all which assumptions may, I think, with propriety and truth, be made in favor of the transaction of November, 1844, under consideration.

. . . . . It is unnecessary to refer to Boullenois, and other well-known writers of authority on the subject, who are decisive if they can properly be invoked. But, though it is probably quite as unnecessary, I will employ a minute or two in stating three or four maxims or aphorisms, more questionable, perhaps, in point of latinity, than of any solid or important ground, which are, I believe, of general acceptance, generally true and consistent with each other in theory and practice. I mean these:—

“ ‘Statuta suo clauduntur territorio nec ultrà territorium disponunt.

“ ‘Bona mobilia sequi et regulari debent secundum statuta loci domicilii ejus ad quem pertinent vel spectant.

“ ‘Si lex actui formam dat inspiciendus est locus actûs non domicilii.

“ ‘Si de solemnibus quæritur aut de modo actûs ratio ejus loci habenda est ubi celebratur.’

“I have but one superfluous word more to say before passing to another part of the case. It is notoriously of continual practice in this court to deal with the personal property of married women, domiciled elsewhere than in England, otherwise than it would be dealt with were they domiciled in England; to do so, merely by reason of the domicil. The law of the country of the domicil being attended to, a husband not domiciled here, often, as we all know, exercises powers, and obtains benefits, which an English husband could not.” *Guepratte vs. Young*, 4 De Gex & S. 217.

*Mortgagor and Mortgagee—Power of Sale—Notice—Infant Heir of Mortgagor.*—In a mortgage deed, it was required that notice of a sale under the power therein contained should be given to the *mortgagor*, his

*heirs or assigns.* The mortgagor died, leaving an infant heir. It was held, by Sir R. T. Kindersley, V. C., that notice to the infant heir and his guardian was good notice. *Tracey vs. Lawrence*, 2 Drew. 408.

*Mortgagor and Mortgagee—Statute of Limitations—Mortgagee in Possession—Acknowledgment of Mortgage.*—A mortgagee had been more than twenty years in possession when the mortgagor's solicitor wrote to the mortgagee, on the 2d of February, 1852, requesting to know when he could see him as to his claims on the mortgaged property. The mortgagee wrote a letter in reply, dated the 5th of the same month, in which he said, "I do not see the use of a meeting unless some party is ready with the money to pay me off." It was held by the Lords Justices, affirming the decision of the Master of the Rolls, that the letter of the mortgagee was a sufficient acknowledgment in writing to exclude the Statute of Limitations, although not written within twenty years after the mortgagee had entered into possession. "It appears to me," observed Lord Justice Knight Bruce, "that the writer of the letter of the 5th of February, acknowledges by it that he holds a redeemable estate in the property to which it relates, that is, that he holds it by way of mortgage. It is said, however, that this does not answer the requisitions of the statute, and that there is not here any acknowledgment of the title of the mortgagor, or of the right of redemption given to the mortgagor, or some person claiming his estate, or to the agent of such mortgagor or person;" and it is contended that the right of the particular person must be acknowledged. But I think that, according to the true construction of the letter of the 5th of February, it must be understood as acknowledging a title to redeem in the person or persons on whose behalf the letter of the 2d was written, to which the letter of the 5th was an answer. I am of opinion that the decree at the Rolls was correct, and that the appeal ought to be dismissed, with costs." *Stansfield vs. Hobson*, 3 De Gex, Mac. & Gord. 620.

*Mortgage of Wife's separate Estate—Presumption that Wife was Surety for Husband.*—A husband and wife joined in raising money upon a mortgage of the wife's separate estate, by a deed, which stated that the money was advanced to both, and contained a covenant by the husband for payment of principal and interest. The husband having appointed his wife executrix, she paid off the mortgage debt out of the general assets, and took a re-assignment to herself of the mortgaged premises. The testator's assets being insufficient to pay his debts in full, a question was raised by a simple contract creditor whether the mortgage debt ought to have been paid in priority to his simple contract debts. It was held, by Sir W.

Page Wood, V. C., first, that a presumption arose which might be rebutted by extrinsic evidence that the payment of the mortgage money was made to the use of the husband; secondly, that, in the absence of such evidence, the wife was only surety for her husband, and was entitled after his death, as against the other creditors, to all the rights incident to that relation, and was therefore entitled to have the mortgage paid off out of her husband's assets, as a specialty debt, in priority to his simple contract creditors. "The point," said his honor, "has never been actually decided" as between the husband's other creditors and the wife's estate; but in *Tate vs. Austin*, 1 P. Wms. 264; 2 Vern. 689, Lord Cowper said that the wife had the right of a surety, except as against onerous creditors of her husband, and that as against them she had not such rights. Lord Thurlow, in *Clinton vs. Hooper*, 1 Ves. jun. 187; 3 Bro. C. C. 200, noticed that dictum in *Tate vs. Austin*, and said that he regarded the doctrine as then settled, his words being: "The rule I take to be universally this—that the title she has is precisely the same as that of an heir-at-law; because, in *Tate vs. Austin*, though not the question in the cause, and consequently not weighed upon argument, yet the court was very clear that the wife cannot insist upon being paid in preference to onerous creditors." His honor, noticing that this also was a mere dictum of Lord Thurlow's, added, "It is necessary, therefore, to look at the reason of the rule, and see how far it applies to a case where the wife's property is settled to her separate use. All the decisions on this question have been in cases in which the wife's property was not settled to her separate use, but in which the wife, having unsettled freehold property, by levying a fine or otherwise, has made a charge upon such property; and it was in reference to such a case that Lord Thurlow said, in *Clinton vs. Hooper*, 1 Ves. jun. 187, that it might seem hard upon the wife, but an assumpsit could not be raised as between her and her husband; and he said, "I have put it as between heir and executor, as the cases oblige me to put it, for the reason mentioned, because an assumpsit between husband and wife will not be raised more in equity than at law." And in commenting upon *The Earl of Kinnoul vs. Money*, 3 Swanst. 202, in which Lord Camden intimated a different view, because he said that the court regards the husband and wife as two distinct parties in such a case, saying, according to the note of that case in Mr. Swanston's Reports, that the court, as it were, dissolves the marriage *quoad* the transaction. Lord Thurlow observed, "Perhaps it is considered rather too figuratively, in saying the marriage is dissolved in that respect. That is not in Mr. Ord's note, nor any trace of it in *Tate vs. Austin*, and the

other cases. They say the court will not infer an equitable assumpsit contrary to the tenor of the obligation subsisting between husband and wife, who cannot contract with each other directly without trustees."

"Whatever should ultimately be held to be the law in this respect, and I think that there will be some difficulty in supporting these dicta, although by such eminent judges, it is clear that no question as to assumpsit can exist where the estate is settled to the separate use of the wife. That is a case in which the court recognizes her as a *feme sole*, competent to deal with her property in every respect; and therefore an assumpsit would arise just as though she were a mere stranger. A wife, effecting a charge upon her separate property in favor of her husband, is precisely in the same position as though she had lent to him the savings of the income of such property deposited at her bankers, and which there is no doubt that he can lawfully borrow from her. She stands in the very position, with respect to her separate property, which Lord Thurlow says is too figurative a description of her position in the other case. It must be observed, however, that it is difficult to see on what other grounds, except that of an implied assumpsit, this doctrine of her right as surety ever arose. The wife is not in the mere position of the heir, for the heir cannot assert his right against legatees, but the wife can; and how she can acquire a better position than the heir, except by such an assumpsit, it is not easy to understand. Where the wife has separate estate, then, as it is laid down in *Parteriche vs. Powlet*, 2 Atk. 383, her separate property being applied to pay off the husband's debts, the wife must be considered as a distinct person, and is equally entitled to stand in the place of the husband's creditors as a stranger; and, according to the dictum in *Robinson vs. Gee*, 1 Ves. 252, if her mortgage to secure her husband's debt is paid off out of his assets, the other creditors of the husband have no equity, in case of a deficiency of his assets, to come upon her estate.

"The choice of the mortgage creditor cannot make a distinction on any principle; and, therefore, Lord Hardwicke seems to have held, that, even in the case contemplated by Lord Thurlow in a different view, no such right can exist on the part of the general creditors. The only way in which any question as regards the right of the creditors could arise seemed to me to be, as in *Copis vs. Middleton*, T. & R. 224, whether payment of the debt might not reduce the surety to the position of a simple contract creditor. However, that doctrine would not apply to a case where an executrix paid her testator's debt, because she would be entitled, independently of her rights as a surety, to be recouped out of the testator's estate, and, for that purpose, to stand in the place of the party so paid." *Hudson vs. Carmichael*, 1 Kay, 613.



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TRIAL WITHOUT JURY.<sup>1</sup>

THE JUDICIAL CHARACTER.

The judges may find it an easier duty to try cases unembarrassed by juries ; but they will, we think, feel it to be a nobler function with which they may now find themselves invested, that of forming and giving expression to their own judgments instead of acting as the assistants of other men. Hitherto their duty has been to state, as clearly as might be, the questions to be decided, and to direct and assist, by what is called a careful summing up, twelve men, whose minds may be already possessed by prejudice, or puzzled by the sophistry, or disturbed by the clamor, or led astray by the eloquence of opposing counsel. Some judges, also, with more or less skill and success, and more or less consistently with their duty, have had the habit of making attempts to lead juries to right verdicts,

<sup>1</sup> By the English Common Law Procedure Act of 1854, the Judges of the Superior Courts of Common Law are enabled to try, with the consent of the parties, questions of fact without the intervention of a jury. This radical change in the law has attracted much professional attention, and we give our readers the article presented by the *Law Magazine* for February, 1855.



or to what the judges have deemed right verdicts. There were persons who thought that occasionally the summings up of Lord Abinger had too much the character of pleadings in favor of the side which he considered entitled to the verdict. In the former part of his life at the bar, he had a certain way of his own of telling the jury what their verdict ought to be, so as to leave them scarcely the power of deliberation. This command over juries was more appropriate to the bench, and was frequently, in the case of Lord Abinger, irresistible. We remember a trial at which he presided at Stafford, in which, in the course of his summing up, he explained and illustrated the paradox: the greater the truth, the greater the libel. He put the case of a woman who, having erred in her youth, had afterwards, when residing in another part of the country, married a respectable man, and had become the mother of a family; and he supposed a person, knowing the events of the earlier part of her life, to disclose them for the purpose of annoying her husband, or herself, or her family. The way in which he put the case we cannot attempt to relate. In his quiet tone, Lord Abinger asked, if in such a case the saying would not be true: the greater the truth, the greater the libel. He told them to ask their own hearts for answer. We well remember the answer our own feelings gave; and we could plainly perceive the effect of the question on the minds of the jury; and we now refer to it, not for the purpose of illustrating a paradox, but for the purpose of illustrating the sort of power one of the most successful of modern pleaders, carrying his skill to the bench, exercised over the minds of others.

Lord Ellenborough commanded juries by look and tone. His personal dignity was in itself a power and a strength; but it did not always prevail. The London juries came latterly to resist his charges, as too dictatorial. There have been other instances of the jealousy of juries of habitual attempts by judges to lead them or command them.

Lord Tenterden was more successful, by reason of his lucid statement of the facts, and of the law applicable to them. He seemed to travel with the jury along the right path to justice.

Lord Denman was a striking instance of the power which one man can exercise over other men, when he combines in his one per-

son the scholar, the lawyer, the magistrate, the gentleman. Without art, certainly without the appearance of art, he won the confidence of juries. English lawyers may be proud of Lord Denman.

We sometimes hear praised the careful summing up of a painstaking judge. But how often is a summing up too minutely careful, setting the facts and the combinations of the facts in every possible light, going over them again and again, and distinguishing slight shades from still slighter shades, until every jurymen and every listener is in a state of bewilderment, from which it is hopeless that the jury can recover, with their faculties in a state fit for deliberation. Many of our readers are not old enough to have heard Mr. Justice Littledale sum up, in this manner, circumstantial evidence; and some of his successors have had the same fault. Unfortunately, too, this fault, or weakness, or want of skill, is more frequently shown in the most important trials, those of which the result affects the life of the accused,—trials for murder. The importance of the trial very properly makes the judge as careful as it is in his power to be; but it unfortunately happens that the more care a judge of this character takes, the more inefficient he becomes.

To return to our subject. It remains to be seen whether it will be the practice of parties to consent to dispense with juries. This we consider at least doubtful. When there is a difference between two parties, one may be in the right, and the other in the wrong; but it often happens that both are in the wrong, one being more wrong than the other. The one in the right, or least in the wrong, needs a remedy. He is the most likely of the two to go to law, and he is the most likely to desire that sort of trial which is the most likely to bring the truth to light. He would most likely prefer the judgment of a single judge, a lawyer accustomed to sift and weigh evidence, to the verdict of twelve men taken by lot from the very miscellaneous classes of persons of whose names the jury lists consist. On the contrary, the party in the wrong, or least in the right, is interested in withholding a remedy. He is not the one to commence proceedings; and if proceedings are taken against him, he would most likely prefer the chance of a

verdict of a jury in his favor, to the probability of the judgment of a single judge against him. He is not likely to give his consent to a trial without a jury.

What has happened in the County Courts may serve to illustrate what we mean. In the case of a difference not within the ordinary jurisdiction of the County Courts,—for instance, a dispute involving a question as to the title to land,—the parties in difference may, by consent, give a County Court jurisdiction between them, and thus avoid the delay and expense of a trial at the assizes. Consents of this sort are so rarely given, that the law giving effect to them is almost a dead letter; and inquiries have been made as to the cause of this. Some have suggested the reason to be the interest which the lawyers, by whom the parties in difference are advised, have in preferring the more expensive remedy; but we have formed an opinion that the true cause is the natural disinclination of a wrongdoer to facilitate a remedy for the wrong he has inflicted, and his natural disinclination to do that which may lead to his being compelled to make restitution. He cannot be expected to consent to a cheap remedy. He is more likely to hope that his opponent will, for want of means, be unable to proceed to trial at the assizes, involving, among other great expenses, the maintenance of witnesses for days at an assize town. Universal experience tells us that the game of the wrongdoer is, by delay and increase of expense, to wear out the means and hopes of the person whom he has wronged.

We are inclined to think the better way would be to permit any sort of action to be brought in a County Court at the option of the plaintiff, giving the defendant an equal option to remove into a superior court any cause involving a question not now within the ordinary jurisdiction of the County Court. A person who would refuse an express consent to an action being brought against him, might, nevertheless, not care to take the trouble and incur the expense of removing it when actually brought. Here, again, what we mean is illustrated by what has happened in the County Courts. In any of those Courts any cause is, as a matter of course, tried by the judge without a jury, unless in some cases either party requires a jury. It is very rarely that a jury is required. Things take

their course. So we think it would be better in the Superior Courts if, instead of the dispensing with a jury being made dependent on the concurrence of two parties already in difference, the recourse to a jury were made dependent on its being expressly required by one of them.

Nevertheless, upon the probable supposition that there will be some trials in the Superior Courts of Common Law without juries, we propose to discuss the new functions with which the judges are now invested. Henceforth, instead of having, in all trials of questions of fact, to perform the embarrassing duty of assisting others to do what they could do better alone, they will sometimes find themselves in a position in which their function will be to listen carefully to the evidence, to sift, and compare, and weigh it calmly, to form their impartial conclusions, and to express them clearly, satisfying their own consciences, instead of endeavoring, often vainly, to give a right direction to the consciences of twelve other persons, and making attempts to lead them to a right conclusion.

We will now consider, as forming, it will be seen, a part of our present subject, some of the means of detecting truth when hidden in a mass of conflicting evidence. This is more likely to be effected, now that the interested parties may be heard, than when their evidence was rejected. Those who really know the truth, are now permitted, or if they hold back, may be required to give evidence. In a trial of a question of fact, the truth may generally be said to be present in court, known to one or more persons who conceal it: the object is to bring it to light. Of the various tests of truth, with which the experience of lawyers have made them long familiar, we do not propose to speak. We intend to confine our remarks to those tests only which have become useful by reason of the evidence of interested parties being made admissible.

It sometimes happens that, when two persons, both interested, and both from their character or from circumstances equally unworthy of credit, contradict each other in their evidence, the truth, or the probable truth, may be elicited from their statements, by the process of comparing admissions inadvertently made by one

against his interests, with admissions inadvertently made by the other against his interest. Sometimes, too, admissions against apparent interest are not inadvertent, and are mixed up with false statements for the purpose of giving them a show of candor, or a tinge of honesty. Admissions often supply a clue which may lead to the discovery of the truth, and they are sometimes elicited from a party by effective cross-examination, or by a concluding examination by the judge himself, acting on materials elicited by the counsel in their examination of the parties or witnesses.

Points of this sort have always been of especial importance in the County Courts, in which, from their first establishment, the parties interested have been examined as witnesses. They become more important, because available in a more important judicial sphere, from the time a change of the law rendered the evidence of interested parties admissible in the Superior Courts.

In the County Courts, too, these points were, from the first, of great importance, because questions of fact have always in those courts been generally decided by the judges, the parties seldom having recourse to juries. A judge who can, with sufficient skill, collate admissions made by interested parties, each against himself, so as to arrive at the truth, or probable truth, might find it difficult to suggest, much more to explain to a jury such a course of reasoning, and impossible to direct them, or even give them effectual assistance in the application of it to the questions under investigation. As it may be thought that some of the judges of the County Courts have derived from their past experience, so it may be considered certain that the judges of the Superior Courts will derive from their future experience, powers of analyzing evidence, the greater from their minds not being disturbed in the application of the appropriate tests, by the necessity of finding words by means of which to express to juries the difficult points to be considered. It may be hoped that some of our judges may now have an opportunity of becoming, in the history of their profession, the rivals of Sir William Scott, the great master of the art of discovering truth through the veil of falsehood.

If we might venture a suggestion to the learned persons for whom

we are now contemplating a new sphere of utility and fame, we would suggest the necessity for curbing any feelings of impatience, leading to too early an expression of the effect which is being made by evidence on the mind. From this fault, juries have been usually free, by reason of their habitually passive demeanor. It is a fault to which an active-minded judge may be found very liable, unless he is most careful to avoid it. The more immediate bad effect of impatience or hastiness on the part of a judge may be that, at an early part of the trial, parties or witnesses may be exposed to censure, which further investigation or reflection may show them not to deserve. The more real bad effect is the embarrassment produced on the mind of the judge himself, if, before having heard all the evidence, he makes known the impression made on him by a part of it. A judge, who too soon makes known what is passing in his mind, may not only raise on the one side hopes, and on the other side fears, either of which may needlessly embarrass the party subject to them in the conduct of the cause, but may impose on himself the embarrassing necessity, firstly, of rectifying expressed opinions, and, secondly, of finding terms by means of which fitly to express the change which his opinions undergo. It is an undignified position for a judge to find himself obliged to unsay what he has spoken from the bench, and injurious to his reputation to be often obliged to do so; but, moreover, the thing itself is so difficult to do well as materially to impair the efficiency of a judge in the particular cause in which it becomes necessary. The process is hardly consistent with the calmness necessary for the right conduct of a judicial inquiry. The last act of the trial, the delivery of the judgment, when all the proofs and arguments have been heard and considered, is, generally speaking, the earliest period at which a judge can safely give utterance to his opinions or his feelings, and then, so far as is right for the purpose of making known the grounds of his judgment, his place is plainly and fearlessly to declare his opinions and his feelings. We do not say that exceptions will not occur to the rule we are insisting on, that a judge must carefully guard himself against every disposition to impatience. Roguish claims are sometimes

made, and roguish defences are sometimes attempted, which cannot be expected to receive from a man of right feeling any other regard than that of scorn, or any other treatment than that of being summarily crushed. Cases of this sort happen from time to time, but they are comparatively of rare occurrence, and the safest course for a judge is to be slow to perceive them. It is a fatal error to be too ready to stop causes. Injustice, or the sense of injustice, thus caused, may be irreparable. On the other hand, a cause stopped on safe grounds is an excellent precedent, deterring other suitors from attempts to practise imposition on courts of justice.

It will be perceived that we anticipate great advantages to the judicial character from the practice, if it should prevail, of dispensing with juries. We are also sanguine enough to hope for still greater advantages to the character of the English advocate. Sophistry, passion apart from reason, rhetoric without logic, will no longer be effective weapons. Fluency, verbiage, iteration, will be valueless. Clamor, and abuse of parties and witnesses, and personal display, will not serve as substitutes for argument. Those men who, now at the Bar, adorn their profession by their real eloquence, their skill in argument, by their appeals to the feelings, when the feelings are fairly interested, by language deriving real strength from its gravity and moderation, will meet with more ample rewards and honors, and will find many imitators. Then will be felt the truth of the principle, too often unheeded, that the advocate is properly the assistant of the judge, bound to say all that he can fairly say for the party for whom he is retained, but not justified in attempting to mislead the Court or jury by the distortion of facts, or by any artifice inconsistent with a regard for truth. Those persons who, in the struggle for success, have hitherto sometimes more or less habitually yielded to the temptation to say that for their clients which a man would not, consistently with honesty, say for himself, will, when addressing a single judge trying questions of fact, find that such practices must be given up, as unavailing in each particular case, and as destructive of the character of the advocates who have recourse to them. We feel assured, not without some experience to warrant the assertion, that an advocate, properly



qualified for his office, will find his services useful to his clients, in proportion to the candor with which, urging all that may be fairly urged, he abstains from addressing to the Court arguments tainted with falsehood. It is no fanciful contrast to draw, that on the one side of the high-minded pleader of causes, the advocate, in the true sense of the word, who, scorning unworthy artifice, renders good service in the administration of justice; and, on the other side, of the mere hireling, who, with no other object than that of obtaining verdicts, whether rightly or wrongly, habitually distorts the facts, and is an unworthy disturber of what, but for him, might be the pure stream of justice. We believe that the first class is, in these times, becoming more numerous, the latter class more rare. We firmly believe that the more frequent trials of questions of fact by experienced judges, instead of inexperienced jurymen, become, the sooner will the class of unworthy hirelings vanish from our tribunals, and the sooner shall we see realized the theory, that the advocate is an assistant judge. Need we dilate on the consequent advantages to the judge, to the litigants, and to the community?

We have yet one suggestion to make to the learned judges; the importance of a summing up, a statement of the grounds of each decision. We have reason to believe that the suitors will be better satisfied, if a judge, who, deciding questions of fact, will state the grounds of his decision, than if he pronounces a bare "Judgment for the plaintiff," or "Judgment for the defendant," like the verdict of a jury, for the plaintiff, or for the defendant. But we should not have adverted to this point, were it not that we have still greater reason for believing that the losing party likes to know why he loses, and is pleased if he can gather from the judgment, that all facts and arguments, making apparently in his favor, have received due consideration. But this, and similar points, occupy doubtless the thoughts of those who have now cast on them a new class of duties. To the discharge of those duties they will bring those qualities which make them worthy of their high position, rendered still higher and more useful by their becoming now, more than ever, the real arbiters of questions and disputes arising among the inhabitants of this great country.

J. F.



## RECENT AMERICAN DECISIONS:

*In the Supreme Court of the United States, December Term, 1854.*

WILLIAM FONTAIN, APPELLANT, vs. WILLIAM RAVENEL.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

1. A testator devised as follows: "Forasmuch as there will be a surplus income of my estate beyond what will be necessary to pay my said wife's annuity and the other annuities, I do therefore direct my said executors to invest the said surplus income and all accumulation of interest arising from that source yearly, for and during all the term of the natural life of my said wife, \* \* \* \* and from and immediately after the decease of my said wife, then all the rest, residue and remainder of all my estate, \* \* \* \* I authorize and empower my executors, or the survivor of them, after the decease of my said wife, to dispose of the same for the use of such charitable institutions in Pennsylvania and South Carolina as they or he may deem most beneficial to mankind, and so that part of the colored population in each of the said States of Pennsylvania and South Carolina shall partake of the benefit thereof." All the executors of the will died before the testator's widow, and without having attempted to make an appointment under the power conferred on them. *Held*, That the disposition of the residuary estate of the testator, subject to the power of appointment of the executors, failed, and that the heirs and next of kin of the testator were entitled to it.
2. No Court of Chancery, either in South Carolina or Pennsylvania, can administer the fund in question, and it remains unaffected by the bequest, because the means through which it was to have been given and applied have failed.
3. In England, when the Chancellor directs the application of property which has been the subject of an ineffectual charitable disposition, in accordance with the will of the sovereign, indicated under the sign-manual, or when that officer himself executes the *cy pres* power in regard to such property, he does not act in the discharge of his ordinary chancery powers.
4. No special trust is vested in the executors, by reason of this power of appointment. It is separable and distinct from their ordinary duties and trust as executors. It was to be exercised after the death of the wife of the testator; but the executors died before her decease, and consequently they had no power to make the appointment. The conditions annexed by the testator to the power rendered the appointment impossible.
5. There must be some creative energy to give embodiment to an intention which was never perfected. Nothing short of the prerogative power, it would seem, can reach this case. There is not only uncertainty in the beneficiaries of this charity, but there is a more formidable objection—there is no expressed will of the testator. He intended to speak through his executors, or the survivor of them, but by

the acts of Providence this has become impossible. It is then as though he had not spoken, and no power can now speak for him except that of the *parens patriæ*.

6. When there is nothing more than a power of appointment conferred by the testator, there is nothing on which a trust, on general principles, can be fastened. The power given is a mere agency of the will, which may or may not be exercised at the discretion of the individual. And if there be no act on his part, the property never having passed out of the testator, it necessarily remains as part of his estate. To meet such cases, a prerogative power, such as that of the king, in England, must be invoked, which there, through the Chancellor, can give effect to the charity.

7. Some late decisions in England, involving charities, evince a disposition rather to restrict than enlarge the powers exercised on this subject. An arbitrary rule in regard to property, whether by a king, or chancellor, or both, leads to uncertainty and injustice.

#### Opinion of Mr. Chief Justice TANEY:<sup>1</sup>

I concur in the judgment of the court. But I do not for myself desire to express an opinion upon either the law of Pennsylvania or of South Carolina, in relation to charitable bequests. For assuming every thing to be true that is stated in the complainant's bill, and that the bequest is valid by the laws of Pennsylvania, and would be carried into execution by the tribunals of the State, yet I think the circuit court of the United States had not jurisdiction to establish and enforce it—and was right, therefore, in dismissing the bill. I propose to show very briefly the grounds on which this opinion is formed.

Undoubtedly a charitable bequest of this description would be maintained in the English court of chancery. The death of the executors in the lifetime of the widow would make no difference. The bequest would still be good against the heirs or representatives of the testator, and the fund applied to charitable purposes according to a scheme approved by the chancellor, or authorized under the sign-manuel of the king.

But the power which the chancellor exercises over donations to charitable uses, so far as it differs from the power he exercises in other cases of trust, does not belong to the court of chancery as a court of equity, nor is it a part of its judicial power and jurisdiction.

<sup>1</sup> For the opinion of the Court, see *ante*, p. 264.

It is a branch of the prerogative power of the king as *parens patriæ*, which he exercises by the chancellor.

Blackstone in his Commentaries, 3d vol. 47, enumerating what he states to be *extraordinary* powers of the chancellor, says: "He is the general guardian of all infants, idiots, and lunatics, and has the general superintendence of all charitable uses in the kingdom; and all this over and above the vast and extensive jurisdiction which he exercises in his judicial capacity in the court of chancery." And in the same volume, page 437, he says: "The king as *parens patriæ* has the general superintendence of all charities, which he exercises by the keeper of his conscience, the chancellor; and, therefore, whenever it is necessary, the attorney general at the relation of some informant files an *ex officio* information in the court of chancery to have the charity properly established."

So, too, Cooper, in his chapter on the jurisdiction of the court, says: "The jurisdiction, however, in the three cases of infants, idiots or lunatics, and charities, does not belong to the court of chancery as a court of equity, but as administering the prerogative and duties of the Crown."

And in the case of the Baptist Association vs. Hart's Executors, 4 Wheat. 1, this court, after examining many English authorities upon the subject, affirm the same doctrine. And Chief Justice Marshall, who delivered the opinion of the court, expresses it in the following strong and decisive language, (page 48.)

"It would be a waste of time (says the Chief Justice) to multiply authorities to this point, because the principle is familiar to the profession. It is impossible to look into the subject without perceiving and admitting it. Its extent may be less obvious.

"We now find (he continues) this prerogative employed in enforcing donations to charitable uses, which would not be valid if made to other uses; in applying them to different objects than those designated by the donor, and in supplying all defects in the instrument by which the donation is conveyed, or in that by which it is administered."

Resting my opinion upon the English authorities above referred to, and upon the emphatic language just quoted from the decision

of this court, I think I may safely conclude that the power exercised by the English court of chancery "in enforcing donations to charitable uses, which would not be valid if made to other uses," is not a part of its jurisdiction as a court of equity, but a prerogative power exercised by that court.

It remains to inquire whether the Constitution has conferred this prerogative power on the courts of equity of the United States.

The 2d section of the 3d article of the Constitution declares that the judicial power of the United States shall extend to all cases in law and equity specified in the section. These words obviously confer judicial power, and nothing more; and cannot upon any fair construction be held to embrace the prerogative powers, which the king, as *parens patriæ* in England, exercised through the courts. And the chancery jurisdiction of the courts of the United States, as granted by the Constitution, extends only to cases over which the court of chancery had jurisdiction in its judicial character as a court of equity. The wide discretionary power which the chancellor of England exercises over infants, lunatics or idiots, or charities, has not been conferred.

These prerogative powers, which belong to the sovereign as *parens patriæ*, remain with the States. They may legalize charitable bequests within their own respective dominions, to the extent to which the law upon that subject has been carried in England; and they may require any tribunal of the State, which they think proper to select for that purpose, to establish such charities, and to carry them into execution. But state laws will not authorize the courts of the United States to exercise any power that is not in its nature judicial; nor can they confer on them the prerogative powers over minors, idiots and lunatics, or charities, which the English chancellor possesses. Nobody will for a moment suppose that a court of equity of the United States could, in virtue of a State law, take upon itself the guardianship over all the minors, idiots or lunatics in the State. Yet these powers in the English chancellor stand upon the same ground, and are derived from the same authority, as its power in cases of charitable bequests.

State laws cannot enlarge the powers of the courts of the United

States beyond the limits marked out by the Constitution. It is true that the courts of chancery of the United States, in administering the law of a State, may sometimes be called on to exercise powers which do not belong to courts of equity in England. And, in such cases, if the power is judicial in its character, and capable of being regulated by the established rules and principles of a court of equity, there can be no good objection to its exercise. It falls within the just interpretation of the grant in the Constitution. But, beyond this, the State laws can confer no jurisdiction on the courts of equity of the United States.

In the cases in relation to charities which have come before this court, there has been a good deal of discussion upon the question, whether the power of the chancery court of England was derived from the 43d of Elizabeth, or was exercised by the court before that act was passed. And there has been a diversity of opinion upon this subject in England, as well as in this country. In the case of the *Baptist Association vs. Hart's Executors*, Chief Justice Marshall, who delivered the opinion of the court, (vide 4 Wheat. 49,) and Mr. Justice Story, who wrote out his own opinion, and afterwards published it in the Appendix to 3 Pet. Rep., (vide p. 497,) were both at that time of opinion that it was derived from the statute. But in *Vidal vs. Girard's Executors*, 2 How. 127, Mr. Justice Story changed his opinion, chiefly upon the authority of cases found in the old English records, which had been printed a short time before by the commissioners on public records in England. It appeared from these records that the power had been exercised in many cases long before the statute was passed.

But this circumstance does not affect the question I am now considering; for, whether exercised before or not, yet, whenever exercised, it was in virtue of the prerogative power, and not as a part of the jurisdiction of the court as a court of equity. The statute conferred no new prerogative on the Crown. And Lord Redesdale, (1st Bligh. 347,) while he held that the power existed in the chancellor before the statute, and had been frequently exercised, declares it to be a prerogative power, and says: The King, as *parens patriæ*, has a right by his proper officer, the attorney general, to call upon

the several courts of justice, according to the nature of their several jurisdictions, to see that right is done to his subjects who are incompetent to act for themselves, as in the case of charities and other cases.

Besides, if it could be shown that at some remote period of time the court of chancery exercised this power as a part of its ordinary jurisdiction as a court of equity, it would not influence the construction of the words used in the Constitution. For at the time that instrument was adopted, it was universally admitted by the jurists in England and in this country, as will appear by the references above made, this extraordinary and unregulated power in relation to charities was not judicial, and did not belong to the court as a court of equity. The Constitution of the United States, as I have before said, grants only judicial power at law and in equity to its courts; that is, the powers at that time understood and exercised as judicial, in the courts of common law and equity in England. And it must be construed according to the meaning which the words used conveyed at the time of its adoption; and the grant of power cannot be enlarged by resorting to a jurisdiction which the court of chancery in England, centuries ago, may have claimed as a part of its ordinary judicial power, but which had been abandoned and repudiated as untenable on that ground, by the court itself, long before the Constitution was adopted.

Cases may arise in a circuit court of the United States, in which it would be necessary to decide whether the English doctrine as to charities was founded on the statute, or was a part of the law of England before the statute was passed. And in a suit by an heir or representative of the testator, authorized from his place of residence to sue in a court of the United States, to recover property or money bequeathed to a charity, the court must of necessity examine whether the bequest was valid or not by the laws of the State, and barred by the claim of the heir or representative. And if in such a case it appeared that the State had not adopted the statute, it would be necessary to inquire whether the law in relation to these bequests was a part of the common law before the statute, and administered as such by the English court of chancery, and whether it had been

adopted by the State as a part of its common law. For the prerogative powers of the English Crown in relation to minors, idiots or lunatics, and charities, are a part of the common law of England; and the people of any State, who deemed it proper to do so, might vest these powers in the courts of the State.

Such an inquiry was necessary in the case of *Vidal vs. Girard's Executors*, and of *Wheeler vs. Smith*. But the question of jurisdiction is a very different one when a court of the United States is called upon to execute the duties of the sovereignty of the State, and to take upon itself the discretionary powers which, if they exist at all by its common law or statutes, belong to the official representatives of the *parens patriæ*, that is, the State sovereignty. And in the case of the *Baptist Association vs. Hart*, although the court did not expressly deny its jurisdiction to establish the charity, if it had been valid by the laws of Virginia, yet it expressed its doubts upon the subject, saying that the question could only arise where the attorney general was a party.

For these reasons a court of chancery of the United States must, in my opinion, deal with bequests and trusts for charity as they deal with bequests and trusts for other lawful purposes; and decide them upon the same principles and by the same rules. And if the object to be benefited is so indefinite and so vaguely described, that the bequest could not be supported in the case of an ordinary trust, it cannot be established in a court of the United States upon the ground that it is a charity. And if from any cause the cestui que trust, in an ordinary case of trust, would be incapable of maintaining a suit in equity to establish his claim, the same rule must be applied where charity is the object, and the complainant claims to be recognized as one of its beneficiaries.

I concur, therefore, in confirming the judgment of the Circuit Court, dismissing the bill; but I concur upon the ground that the court had no jurisdiction of the case stated by the complainant, and express no opinion as to the validity or invalidity of this bequest, whether in this respect it be governed by the laws of Pennsylvania or of South Carolina.



*In the Circuit Court of the United States for the Eastern District  
of Pennsylvania, October, 1854.*

THE STEAM TUG SAMPSON.<sup>1</sup>

1. The Court confirming its decision in the case of *Smith vs. The Creole and Sampson*, (2 Wallace, Jr. 485,) applies more strongly the doctrines of that case; and holds that when even small vessels, as coal heavers, are in tow, the towing boat is the servant of the vessel towed, and that the Tug, being thus bound to obey the orders of the other vessel, is not responsible, though in point of fact giving orders to her, for damages in the proper course of its employment.
2. Though the rule of porting the helm is obligatory, when in ordinary cases, vessels meet in the same line, it is not one always to be observed when they are in *parallel* lines. Circumstances control the rule; and, when a boat is moving against the tide, slowly and with difficulty, (as when tugging a heavy vessel,) and is out of the centre of the channel, which is left free to the other, the rule can have no application.
3. Steamers, especially large steamers, are held to the strictest care possible when in ports or in the neighborhood of sailing and smaller vessels; and must move slowly and with extreme circumspection. And if from violation of this duty, small or sailing vessels are put suddenly into confusion or jeopardy, the Court will not inquire whether the rules applicable to ordinary cases of meeting, have been strictly observed by the weaker vessel, or not; but will hold the steamer responsible, as reckless, for all injury happening to or committed through the act of the weaker vessel, from mistake caused by the embarrassment natural to the condition into which the steamer had put this weaker vessel.

A large steamer was coming, on a moonlight and pretty clear night, up the Delaware and opposite the City of Philadelphia, at her ordinary speed of 11 miles an hour; the tide being full in her favor, and she having come up the middle of the channel (here about 960 feet wide,) that she might have the whole benefit of the current. A small tow steam-tug, The Sampson, of 65 horse power, was towing, at the same time, in an opposite direction, a heavily laden coal schooner of 145 tons, which was attached to it by a hawser, 15 to 20 fathom long. The tug and schooner were working along at the rate of 2½ miles an hour, against the tide, and were hugging the shore (being within 90 to 160 feet of it) of an island opposite the city; as well that they might avoid the strength of the current against them, as that they might be out of the way of ferry-boats

<sup>1</sup> This case will be found in 3 Wallace, Jun., yet unpublished.



emerging suddenly from the city docks, opposite. They could go no nearer to the shore of the island with safety than they were. The steamer being near her place of landing, ported her helm and sheered towards the island for the purpose of rounding to at the city wharf. She had not seen the tug: and the schooner—in consequence of her spars being without sails, her motion being scarcely apparent, and her position being close upon the island where vessels often anchor to await a change of tide—was mistaken by the steamer for a vessel at anchor. The tug seeing the movement of the steamer in rounding to, and clearly foreseeing a collision if she, herself, went on her course, starboarded her helm to get still closer to the island. The schooner who had been directed by the tug's pilot to follow in the wake of the tug, did the same. The tug escaped, but the schooner was brought directly into the line of the steamer and notwithstanding all the steamer's efforts at this moment, by porting her helm, to get between the schooner and the island, a serious collision took place. Had the schooner ported her helm, and cut the tow-line she would probably have escaped.

Libels being filed by the steamer against the tug and schooner, and by the schooner against the tug and steamer, the District Court was of opinion, on this case, that the collision was directly attributable to the act of the tug in starboarding her helm and so taking the schooner nearer to the island, instead of doing the reversed manœuvre, of porting, which would have taken both the tug and her tow out into the channel. The tug was accordingly condemned by that Court to answer the damages which both steamer and schooner had suffered.

The case came now by the tug's appeal into this Court, where it was argued by

*Mr. Serrill*, for the schooner; by

*Messrs. Ludlow and Cadwalader*, for the steamer; and by

*Messrs Gerhard and Williams*, for the tug.

After argument the opinion was thus given by

GRIER, J.—By the decision of this Court in the case of *The Creole* 2 Wallace, Jr. 485, the remedy of the steamboat is to be sought

against the schooner, and not against the tug employed to tow her. The tug was the servant of the schooner, and bound to obey the orders of her master, and if the master choose to follow the directions of the pilot or steersman of the tug, and trust to *his* skill instead of his own, the acts of the pilot may be justly considered as his own, and adopted by him. The remedy of the owner of the steamboat (if entitled to any) is therefore against the schooner, and not against its servant, the tug. Nor have we any evidence of any disobedience of orders by the tug that should render it liable to the schooner. For if the master of the schooner gave no directions to the pilot or steersman of the tug, but submitted his own will to the pilot's skill, he has adopted his acts and has no right to charge the owners of the tug for his own negligence. The tug Sampson and owners are therefore entitled to a decree in both cases.

Assuming the schooner to be liable for the acts of her servant, the contest between her and the steamboat remains to be considered.

The tug and schooner were hugging the shore. It was, under the circumstances, their proper place. When the tug saw the steamboat coming up the river, she was bound by no rule of navigation, or common sense, to cross the channel to avoid a steamboat coming up the middle of the river. She had left 800 of 960 feet of the channel free to the steamboat. Knowing her own position at one side of the channel, the tug could not anticipate the gross mistake made by the steamboat with regard to her position, or that she would needlessly cross the channel, and run under the bows of the tug and schooner. Both were carefully keeping out of harm's way, when the steamer suddenly comes down upon them by sheering out of her proper course, and the tug escapes destruction the best way she can, in the sudden emergency produced by the mistake and reckless haste of the steamboat. Whether the tug turned to the right or left to save herself from destruction, is of no importance. It was the mistake or carelessness of the steamboat to put her to the necessity of turning either way. The rule of porting the helm where vessels are meeting in a line, should invariably be observed; but where vessels are in parallel lines, when one boat is working against the tide, and with difficulty tugging a heavy vessel, keeps

near the shore and leaves a free channel to the other who is coming up in the middle of it, the rule of porting the helm can have no application.

If the tug had ported her helm on seeing the steamer, she would have thrown her long tow obliquely across the middle of the channel, up which the steamboat was coming. The steamboat by turning out of her course to run under the bows of a vessel hugging the shore, when a wide channel was left open before her wholly unobstructed, cannot now be heard to complain of the comparatively helpless and slow-moving vessels for not exercising more skill in getting out of her way. It was the duty of the steamboat moving with great power and momentum, with a tide in her favor, to keep out of the way of small and slow vessels, one of which was helpless, and the other slowly and painfully dragging behind her. The officer of the steamboat should have slackened her pace in order to have time to observe the difficulties of his position and to ascertain the *correct* situation of vessels, whether moving or stationary in the harbor. With her huge mass and great momentum the steamboat cannot be allowed to dash, as a triton or leviathan among minnows, into the midst of smaller vessels in a port, calling upon them to take care and keep out of the way, or to learn at their cost the rule of "Port your helm."

Every one knows the deception as to the relative position of bodies to which those on board a vessel, moving into port after night are subject. Moonlight may extend the range of vision, but it will nevertheless subject the most sharp-sighted to great mistakes in a port where some objects may be moving swiftly, others slowly, and some at rest. The headway or momentum of a large steamboat, moving at a velocity of ten or eleven miles an hour, cannot be so suddenly checked, on the discovery of an error, as to hinder disastrous collisions, and there cannot be a better rule of navigation, than that which will subject steamboats to all the damage occasioned by such reckless conduct in a crowded and narrow port after night. The steamboat must therefore bear its own injury, and must also answer for the damage done to the schooner.

**Decree reversed.**

*In the Supreme Court of Ohio.*

JOHN G. KERWHAKER vs. THE CLEVELAND, COLUMBUS, AND CINCINNATI RAILROAD COMPANY.<sup>1</sup>

- I. There is no law in Ohio prohibiting the owners of domestic animals, consisting of cattle, horses, hogs, &c., from permitting such animals to run at large upon the range of unenclosed lands, except when unruly and dangerous; and the rule of the common law of England, requiring the owner of such animals to keep them on his own land, or within enclosures, has never been in force in Ohio, being inapplicable to the circumstances, condition and usages of the people, and also inconsistent with the legislation of the State.
- II. The owner of such animals, in allowing them to be at large on the range of unenclosed lands, is not chargeable with *an unlawful act*, or an omission of *ordinary care* in keeping his stock, doing nothing more than that which has been customary, and by common consent, done by the people generally since the first settlement of the State, subject to the qualification, however, that animals which are unruly or dangerous, are required to be restrained.
- III. There is no law in this State requiring any person to fence or enclose his own lands; yet the person who leaves his grounds unenclosed, takes the risk of occasional intrusions thereon, by the animals of others running at large. And the owner of such animals, in allowing them to be at large, takes the risk of their loss, or of injury to them by unavoidable accident, from any danger into which they may happen to wander.
- IV. The right of a railroad company to the free, exclusive and unmolested use of its railroad track, is nothing more than the right of every land proprietor, in the actual use and occupancy of his lands; and does not exempt the Company from the duty enjoined by law upon every person, so to use his own property as not to do any unnecessary injury to another.
- V. There is no law in Ohio requiring railroad companies to fence their roads, but when they leave their railroads open and unenclosed by sufficient fences and cattle-guards, they take the risk of intrusions upon their roads by animals running at large, as do other proprietors, who leave their lands unenclosed; so that the owner of domestic animals, in allowing them to be at large, takes the risk of their loss, or of injury to them by unavoidable accident; and the company by leaving its road unprotected by an enclosure, runs the risk of animals at large getting upon the road, without any remedy against the owner of the animals.
- VI. The liability to make reparation for an injury by negligence, is founded upon an original moral duty enjoined upon every person, so to conduct himself, or exercise his own rights, as not to injure another.

<sup>1</sup> This recent decision on the right to reparation in damages for injuries to domestic animals by Railroad Companies in Ohio, is published at the request of a number of members of the Western bar.—*Eds. Am. L. Reg.*

VII. The mere fact that one person is in the wrong, does not necessarily discharge another from the due observance of proper care towards him, or the duty of so exercising his own rights, as not to do him any unnecessary injury.

VIII. The doctrine that, in the case of an injury by negligence, where the parties are mutually in fault, the injured party is not entitled to redress, is subject to the following material qualifications, as appears from a review of the decisions both in England and in this country, on the subject, to wit:

1. The injured party, although in the fault to some extent—at the time, may notwithstanding this, be entitled to reparation in damages for an injury, which he used ordinary care to avoid.
2. When the negligence of the defendant in a suit upon such ground of action, is the *proximate* cause of the injury, but that of the plaintiff only *remote*, consisting of some act or omission, not occurring at the time of the injury, the action is maintainable.
3. Where a party has in his custody or control, dangerous instruments, or means of injury, and negligently places or leaves them in a situation unsafe to others, and another person, although at the time even in the commission of a trespass, or otherwise somewhat in the wrong, sustains an injury thereby, he may be entitled to redress.
4. And when the plaintiff in the *ordinary exercise of his own rights*, allows his property to be in an exposed and hazardous position, and it becomes injured by the neglect of ordinary care on the part of the defendant; he is entitled to reparation on the ground that, although, in allowing his property to be exposed to danger, he took upon himself the risk of loss or injury by *mere accident*, he did not thereby discharge the defendant from the duty of observing *ordinary care*, or in other words, voluntarily incur the risk of injury by the defendant's *negligence*.

IX. Having left its railroad unenclosed through a country where domestic animals are allowed to be at large, and thus exposed to the casualties of the animals accidentally getting upon the railway track, it is the duty of the railroad company, acting through its agents, to use *at least ordinary and reasonable care and diligence* to avoid unnecessary injury to the animals, when found in the way of a train on the road.

X. The first and paramount object of the attention of the agents of the company, is due regard for the safety of the persons and property in their charge on the train, for which they are held to a high degree of care, and so far as consistent with this paramount duty, they are bound to the exercise of what in that peculiar business would be *ordinary and reasonable care* to avoid unnecessary injury to animals casually coming upon their unenclosed road; and *for any injury to animals arising from a neglect of such care, the company is liable in damages to the owner*.

Writ of Error to the Court of Common Pleas of Morrow County.

In the Court below, the plaintiff in error declared against the defendant, in trespass on the case, for the alleged negligence and

misconduct of the defendant's agents in conducting and running a locomotive and cars on the defendant's railway track, whereby six hogs, the property of the plaintiff, were killed. The defendant pleaded the general issue.

On the trial of the cause before a jury, it appeared that the defendant's railroad extending from Columbus to Cleveland, passed through the farm of the plaintiff, on which he resided, in the county of Morrow: that on the 17th of April, 1851, a train of cars, under the management of defendant's agents, in passing upon said railroad through the plaintiff's farm, run upon the plaintiff's hogs, which had wandered off upon the railway track, and killed them. And evidence was offered on the part of the plaintiff, tending to prove, that at the time the hogs were killed, the train was passing at the usual and ordinary speed, and that from the situation of the railroad at that locality, and the relative situation and locality of the hogs, and the train of cars on the railroad, at the time of the occurrence, the defendant's agents in control of the train, could easily and readily have so checked the speed of the cars, as to have permitted the plaintiff's hogs to have escaped from the railroad track without injury: but that the agents of the defendant did not check the speed of the train, but continued to run the same with unabated speed, by reason whereof the hogs were unable to escape, and were killed. And it appears, also, that evidence was offered on the part of the defendant, tending to prove that at the time of the occurrence, the agents of the defendant, did check the speed of the train, that the usual signal was given to check up, before the cars ran over the hogs—that the train was at the time running at its usual and ordinary speed.

The testimony having been closed, the plaintiff's counsel asked the court to charge the jury, that if they were satisfied from the evidence, that the defendant's agents could by the exercise of ordinary care and caution, have so checked the speed of said train of cars, as to have permitted the plaintiff's hogs to have escaped without injury: but that the defendant's agents did not at all check the speed of the train, or attempt so to do, but continued to run the same at the usual and ordinary speed, by means whereof the plain-

tiff's hogs were killed, the plaintiff would be entitled to a verdict for the value of the hogs so killed. The court, however, refused to give this in charge to the jury, but instructed the jury as follows:

1st. That the defendant had a right to have the track of its railroad free from obstructions, so that its trains might run thereon with safety, subject to be crossed only on public highways and regular private crossings, and that, therefore:

2d. If the jury found from the evidence that said hogs, of the plaintiff were killed while on the track of said railroad, and not while crossing said railroad at such public or private crossing, that said hogs were unlawfully upon said track, that said defendant was not bound to check the ordinary and usual speed of said cars; and that if said hogs were killed by defendant's train of cars, while in the ordinary way passing along said track, said plaintiff had suffered damage but not injury from the act of the defendant, and that the defendant was not liable therefor.

To the charge thus given by the court below to the jury, and the refusal to charge as requested, the plaintiff excepted, and took his bill of exceptions, setting out the facts as above stated.

Under the instructions of the court below, the jury returned a verdict for the defendant, on which judgment was rendered, to reverse which this writ of error is prosecuted.

*S. J. Kirkwood and B. Burns*, Attorneys for plaintiff in error.

*Finch & Olds*, and *H. B. Carrington*, Attorneys for defendant.

The opinion of the Court was delivered by

BARTLEY, J. — A maxim of the law, tested by the wisdom of centuries—exacts of every person in the enjoyment of his property, the duty of so using his own as not to injure the property of his neighbor. It is in accordance with this principle, that it has been held, that though a person do a lawful thing, yet, if any damage thereby befalls another, which he could have avoided by reasonable and proper care, he shall make reparation. Hence the general rule, that in all cases where damage accrues to another, by the negligence or improper conduct of a person in the exercise of his peculiar trade



or business, an action is maintainable. *Shields vs. Blackburne*, 1 H. Blacks. 158; *Moore vs. Mourgue*, Cowp. 480; Buller's N. P. 73; Broom's Legal Maxims, 248.

• How far this doctrine is applicable to railroad companies, in the exercise of their peculiar business, is the question presented in the case before us. The court below refused to charge the jury on request, that if they found from the evidence that the defendant's agents could, in the use of ordinary care, have easily and safely avoided the destruction of the plaintiff's property by checking the speed of the train, the defendant would be liable: but on the contrary, instructed the jury, that as the hogs were improperly on the railroad, the defendant's agents were not bound to check the ordinary and usual speed of the cars, or use any means or caution to save the plaintiff's property.

The position taken by the court below, assuming the animals to have been unlawfully on the railroad, would justify not only a wanton disregard of the plaintiff's property, but even an intentional destruction of it, by defendant's agents, providing it occur while running the train on the railroad in the ordinary way, and at the usual speed.

Railroad Companies have become important and useful public agents, affording vast facilities for trade and travel, and producing extensive results upon the social condition as well as the business of the country; but while it is important that they should be fully protected in the appropriate and legitimate exercise of their powers, it is *just* that private individuals be secured from injury or invasion of their rights, by the mode or manner in which railroad companies exercise their peculiar functions. The obligation to make reparation for damages done to another, by a person, in the *improper manner* in which he exercises his own appropriate employment, often requires great nicety of discrimination; and the application of this injunction to railroad companies in their peculiar business, so widely differing from that of other persons, must frequently become a matter of no inconsiderable difficulty.

It is claimed on the part of the defence in this case;

1st. That it is the duty of the owner of domestic animals to keep



them on his own lands, or within enclosures; and that if they wander from his own lands, and get upon the unenclosed lands of his neighbors, they will be *unlawfully* there, and the owner guilty of a trespass.

2d. That the plaintiff being in fault, and guilty of an unlawful act in allowing his hogs to escape from his own lands, and get upon the railroad, he cannot maintain an action for the value of the animals killed by the defendant while in the prosecution of its lawful business, even although the agents of the company might have readily and safely avoided injury to the animals, by the exercise of ordinary care and prudence in the management of the train of cars.

The doctrine that the owner of cattle, hogs, horses, &c., is bound to keep them on his own lands, or within an enclosure, and that he becomes a wrong-doer if any of them escape or stray off upon the lands of another person, although unenclosed, is said to be derived from the common law of England, and to be in force in this State. At an early period in this State the common law of England, and the statutes of that country of a general nature in aid of the common law, passed prior to the fourth year of King James I, were adopted by legislative enactment. But this act was repealed by the General Assembly, on the 2d day of January, 1806, since which time the common law of England has had no force in this State derived from legislative adoption. But having been adopted in the original States of the union, and introduced into Ohio at an early period, the common law has continued to be recognized as the rule of decision in our courts, in the absence of legislative enactments, so far as its rules and principles appeared to be based on sound reason, and applicable to our condition and circumstances. The common law therefore, has no force in Ohio, except so far as it derives authority from judicial recognition in the practice and course of adjudication in our courts; and this extends no further than it explains and illustrates the rules of right and justice as applicable to the circumstances and institutions of the people of the State. In the case of *Sergent vs. Steinberger*, 2 Ohio Rep. 305, the Supreme Court of this State held that the common law, so far as it relates to the subject of the estate by joint tenancy, would not be

recognized in Ohio, upon the ground that the *jus accrescendi* was not founded in principles of natural justice, nor in any reasons of policy applicable to our state of society or institutions, but on the contrary, was adverse to the understandings, habits, and feelings of the people.

Admitting the rule of the common law of England in relation to cattle and other live stock running at large, to be such as stated, the question arises, whether it is applicable to the condition and circumstances of the people of this State, and in accordance with their habits, understandings, and necessities. If this be the law in Ohio now, it has been so since the first settlement of the State, and every person who has allowed his stock to run at large, and go upon the unenclosed grounds of others, has been a wrong-doer, and liable to an action for damages by every person on whose lands his creatures may have wandered. What has been the actual situation of affairs, and the habits, understandings, and necessities of the people of this State from its first settlement up to the present period, in this respect? Cattle, hogs, and all other kinds of live stock, not known to be breachy and unruly or dangerous, have been allowed, at all times and in all parts of the State, to run at large and graze on the range of uncultivated and unenclosed lands. And this prevails not only throughout the country, but also in the villages and cities, except where it may be to a limited extent, restrained by local municipal ordinances. For many years in the early settled parts of the State, the people were unable, and at the present time in some parts of the State, they are yet unable to clear and enclose more ground than that actually needed for cultivation. And there is not at this time perhaps enclosed pasture lands sufficient to confine the one-half of the live stock in the State. Even a statutory enactment imposing the severest criminal punishment for permitting these animals to be at large, could not be enforced without either slaughtering or driving a large portion of them from the State. It has been the habit of the people to enclose their grounds for the purpose of cultivation, and to fence against the animals running at large. And it has been only within a few years, and that only in the better improved parts of the State, that uncultivated pasture grounds have

been enclosed. And this has not been done, because the owners considered themselves required by law to confine their stock within enclosures, but for their own convenience and advantage. So that, it has been the general custom of the people of this State, since its first settlement, to allow their cattle, hogs, horses, &c., to be at large, and range upon the unenclosed lands of the neighborhood in which they are kept; and it has never been understood by them that they were *torsfeasors*, and liable in damages for letting their stock thus run at large. The existence or enforcement of such a law would have greatly retarded the settlement of the country, and have been against the policy of both the General and the State government.

The common understanding upon which the people of this State have acted, since its first settlement, has been, that the owner of land was obliged to enclose it with a view to its cultivation; that without a lawful fence he could not, as a general thing, maintain an action for a trespass thereon by the cattle of his neighbor running at large; and that to leave uncultivated lands *unenclosed*, was an implied license to cattle, and other stock at large, to traverse and graze them. Not only, therefore, was this alledged rule of the common law inapplicable to the circumstances and condition of the people of this State, but inconsistent with the habits, the interests, necessities and understanding of the people.

Besides this, the Legislature of the State has put at rest all question as to the existence of any such rule in Ohio. The proviso in the first section of the statute in relation to strays, recognizes the fact of animals being allowed to run at large upon the range of unenclosed lands, in the following language:

“Provided, that no person shall be allowed to take up any neat cattle, sheep or hogs after the first day of April, and before the first day of November, annually: nor shall any compensation or fees be allowed to any person for taking up any stray animal *from the range where such animal usually runs at large; &c.*”—SWAN’S REVISED STATUTES, 888.

The statute regulating enclosures and providing against trespassing animals, (see Swan’s Revised Statutes, 426,) fixes the requisites of a lawful fence; and in the seventh section, provides the remedy,

when the owner or occupant shall feel himself aggrieved by the animals of another person, which run at large, breaking into his enclosure. And the twelfth section of the same statute provides, that when the fence-viewers shall ascertain any animals to be habitually breachy and unruly, notice thereof shall be given to the owner or keeper, who shall be required thereafter, under a penalty, to restrain such animals from running at large, &c.

This legislation is wholly inconsistent with the doctrine, that it is *unlawful* for the owner of animals to allow them to run at large; and that he is liable in damages for a trespass, in case they go upon the unenclosed grounds of another. Why the provision to restrain breachy and unruly animals from running at large, if it were the law of the State that the owner should allow none of his stock to be at large, whether breachy or not? And why the provision for the assessment of damages for injury by trespassing animals, made to depend upon the contingency of a lawful fence? If the owner of trespassing animals were liable in damages, whether the lands of the injured party were enclosed or not, the provision making the assessment of damages to depend on the existence of a lawful fence, would seem to be unnecessary, if not wholly absurd.

It was adjudged by the Supreme Court of Connecticut, in the case of *Stadwell vs. Ritch*, 14 Conn. Rep. 293, that the rule of the English common law, making it the duty of the owner of cattle to restrain them, and subjecting him to liability in damages for suffering them to go upon the lands of another, whether enclosed or not, does not prevail in that State, being inconsistent with the situation of the country from the time of the first settlement of the State, and also repugnant to the legislative enactments of the State relating to that subject; on the contrary, it was held, that the owners of lands were obliged to enclose them by a sufficient fence, before they could maintain an action for a trespass done thereon by the cattle of another. The same doctrine was laid down by Judge Swift, (see *Swift's Digest*, 525,) and also recognized in the case of *Barnum vs. Vandusen*, 16 Conn. Rep. 200.

It has been said, that in South Carolina a sufficient enclosure was necessary to protect the planter against the inroads of horses, cattle

and hogs, whose right to go at large in the range is derived from the common law of South Carolina. *Town of Beaufort vs. Danner*, 1 Strobhart, 175.

It was held by the Supreme Court of the State of Illinois, in the case of *Seely vs. Peters*, 5 Gilman's Rep. 130, that the common law, requiring the owner of cattle, hogs, &c., to keep them on his own land, has never been in force in Illinois; that there is no general law in that State prohibiting cattle from running at large; and that in order to maintain an action for the trespass of cattle on land, the owner of the land must have it surrounded by a sufficient fence. The subject is carefully investigated in this case, and the ground on which the decision is placed is, that the common law rule is inapplicable to the circumstances and condition of the people, and also inconsistent with the legislation of that State.

It is true, that a contrary doctrine has been held in a number of the other States, but the grounds upon which it is placed do not appear to have any real practicable application to the condition of things in this State. It is said that the purpose of fences, in the view of the common law, is to keep the owner's cattle *in*, and not the cattle of others *out*. *The Tonawanda Railroad Company vs. Munger*, 5 Denio, 255. The reason of a law should never rest in mere abstraction, without any application to the practical affairs of society; and it is a maxim, that when the reason of a rule ceases, the law itself ceases. Fences have two sides to them, and the real and practical purpose of fences in this State has been to protect the enclosure of the proprietor from the intrusion of animals *without*, as well as to confine such as may be kept *within*.

If an action for damages be maintainable, for every instance in which the cattle and other live stock of a person goes upon the unenclosed lands of another without express license, more than nine-tenths of the business men of this State become, for this cause, *tort feasors* every day of the year, and liable to suits for damages, every day. It will not do to say, that although such right of action existed, yet that it would be restrained by the rule *De minimis non curat lex*. This would be a refinement resulting in a distinction without a difference. As there can be no wrong without a remedy,

if there could be no recovery, the right of action in reality could not exist.

This doctrine of the common law may be suitable to an old and highly cultivated country, where all the lands, except the public highways and commons, are under enclosure, but it has no *suitable* and *proper* application in Ohio.

There is no law in Ohio, therefore, requiring the owners of cattle, horses, hogs, and other live stock, to keep them on his own lands, or within an enclosure, and when he allows them to be at large on the range of unenclosed lands, he cannot be said to act *unlawfully*, or to be guilty of an *omission* of *ordinary care* in the keeping or charge of his stock. For by so doing, he does nothing more than that which has been customary, and which has been, by common consent, done generally by the people since the first settlement of the State. It is true, that extraordinary diligence, or the highest degree of care in the management of his stock, would require the owner to confine it in stables, or within sufficient enclosures. But, under ordinary circumstances, all that can be required of a person in the management of his property, is to exercise that degree of care and diligence which men of common prudence, or, in other words, which men in general exercise in taking care of their own property.

This right, however, to allow animals to run at large, has its qualifications. The owner of animals, known to be mischievous or dangerous, is bound to confine them, and if he omit this duty, he is responsible for any loss or damage which any other person may suffer thereby. And whenever the owner is notified of the fact, that any of his creatures at large have become troublesome, by means of breachy, unruly, or dangerous habits, it is his duty to take them up without delay, and confine them. And the right to allow animals, inoffensive in their habits, to be at large, does not imply a *right* in the owner to keep his animals upon another's unenclosed lands against his consent. On the contrary, the owner may drive them off as often as they come on to his lands, using no unnecessary violence; or, he may at any time exclude them permanently, by the erection of a fence, or other means of enclosure. And,

although there is no law in the State requiring any person to fence or enclose his grounds, yet the owner who leaves his lands unenclosed, takes the risk of intrusions upon his grounds from the animals of other persons running at large. And the owner of the animals, in allowing them to be at large, takes all the risk of their loss or of injury to them by *unavoidable accident*, arising from any danger into which they may wander.

Applying the views here expressed to the case under consideration, upon what ground does the plaintiff's claim to reparation in damages rest? Where there is wanton, malicious, or intentional injury done to a person, there is usually no difficulty in determining the liability of the wrong-doer. But where a party suffering loss, seeks redress upon the ground of *mere negligence*, or the *omission of ordinary care* on the part of another, in the conduct or manner of prosecuting his lawful business, there are often difficulties requiring close attention, and sometimes the utmost nicety of discrimination.

Admitting the plaintiff's right to allow his domestic animals to be at large, under ordinary circumstances, it is claimed, that the defendant, having appropriated its railroad track to the exclusive purpose of running its locomotives and trains, and having the undoubted right to pass over its road, unmolested, at usual railroad speed, the plaintiff's hogs had no right to be on the track, and were wrongfully there; and that the plaintiff, in allowing them to be at large in the vicinity of the railroad, where danger was apparent, was *in fault*, and that the injury, therefore, having been caused, *in part* at least, by the negligence of the plaintiff, he cannot maintain the action.

The defendant's right to the exclusive and unmolested use of its railroad track, is undeniable. And it must be conceded that the plaintiff had no *right* to have his hogs on the track, and that they were there improperly. But how came they there? If the plaintiff had placed them there, or, knowing them to be there, had omitted to drive them off, he would have been, perhaps, precluded from all claim to compensation. But it would appear, that in the



exercise of the ordinary privilege of allowing these animals to be at large, by the plaintiff, they accidentally and without his knowledge wandered upon the railroad track. The right of the defendant to the free, exclusive, and unmolested use of its railroad, is nothing more than the right of every other land proprietor, in the actual occupancy and use of his lands, and does not exempt it from the duty enjoined by law upon every person, so to use his own property as to do no unnecessary and avoidable injury to another. Finding the animals upon the track, it was the right, and, indeed, the duty of the agents of the Company to drive them off, but not to injure or destroy them by unnecessary violence. The owner of a freehold estate in lands enclosed by a lawful fence, has a right to expel trespassing animals which have broken through his enclosures, but in doing so, he would become liable in damages to the owner of the animals, if they be injured by the use of unnecessary and improper means; although the latter would be bound to make reparation for the injury done to the former by the trespassing animals. It is not pretended that the railroad of the defendant was under enclosure, through which the plaintiff's hogs had broken. It is true, there is no law in Ohio *compelling* railroad companies to fence their roads; but when they leave their roads *open* and *unfenced*, they take the risk of intrusions thereon from animals running at large, as do other land proprietors who have their lands unenclosed. If a farmer undertake to cultivate his ground in corn, without enclosing it, he would doubtless be troubled by the destructive intrusions of cattle running at large; but, without a sufficient fence, he could not maintain an action against the owner of the animals for the trespass. Had the defendant protected its railroad by a sufficient fence and cattle-guards, and the plaintiff's animals broken over the enclosure, and gone upon the railway track, the plaintiff would no doubt have been liable to the Company in damages for the trespass of the animals. The defendant constructed its railroad *with the knowledge* that it was the common custom of the country to allow domestic animals to run at large upon the unenclosed ground of the neighborhood; and without the precaution of *enclosing* its railroad, the Company could not sustain an action against



the owner of such animals at large as might happen to wander upon the track of the road. The owner of the animals, in allowing them to run at large, takes the risk of their loss or of injury to them by *unavoidable* accident; and the Company, in leaving its road unprotected by enclosure, runs the risk of the occasional intrusions of such animals upon its road, without any remedy against the owner.

The question in this case, however, is, what degree of care, if any, was the defendant bound to use, under the circumstances, to avoid injury to the plaintiff's property? That the plaintiff was in the exercise of the highest degree of care over his property, cannot be fairly claimed. A *very prudent* man would not allow his stock to be at large in the immediate vicinity of an unenclosed railroad, where the animals might accidentally, and without his knowledge, wander off upon the railway track. The plaintiff, therefore, being in one respect negligent or slightly in fault, it is claimed, that he cannot maintain his action, even although the defendant could have avoided injury to the animals, by the use of ordinary care and caution.

It is true, that a party in an action for negligence cannot recover damages which have resulted from his own negligence and want of care; and it has been held, that the party seeking the redress must not only show his adversary to be in the wrong, but also be prepared to prove that no negligence of his own has tended to increase or consummate the injury. But the doctrine that where *both parties are in fault*, the party sustaining the injury cannot recover, is subject to several *very material* qualifications. An effort has been made, however, to sustain its general application, upon the idea of a mutuality of obligation to observe due care and caution; and that negligence by one person absolves another from the duty of care and diligence towards him. In the case of *The Tonawanda Railroad Company vs. Munger*, (5 Denio, 266,) the Court said:

"Negligence is a violation of the obligation which enjoins care and caution in what we do. But this duty is relative, and where it has no existence between particular parties, there can be no such thing as negligence in the legal sense of the term. A man is under no obligations to be cautious and circumspect towards a wrong-doer."

This idea, however, that the liability in damages for negligence depends upon any mutuality of obligation, is more fanciful than real. Puffendorf places the right to reparation upon the ground of an original moral duty, in language both graphic and expressive, as will appear by the following extract :

“ In the series of absolute duties, or such as oblige all men antecedently to any human institution, this seems with justice to claim the first and noblest place, *that no man hurt another ; and in case of any hurt or damage done by him, he fail not to make reparation.* For this duty is not only the widest of all in its extent, comprehending *all men*, on the bare account of their *being men*, but it is at the same time the most easy of all to be performed, consisting for the most part purely in a negative abstinence from acting, except that its assistance is sometimes necessary in restraining the passions, when they fight and struggle against reason, amongst which rebellious desires, that boundless regard which we sometimes show to our own private advantage, seems to be the *principal and the ringleader*. Besides, it is the most necessary of human duties, inasmuch as a life of society cannot possibly be maintained without it. For, suppose a man to do me no good, and not so much as to transact with me in the common offices of life, yet provided he do me no harm, I can live with him in tolerable comfort and quiet.”

Rutherford, in his “Institutes of Natural Law,” page 201, says, that the origin of the right to reparation in damage is founded on a principle of natural law.

It would seem that the liability to make reparation for an injury, rested, not upon the consideration of any reciprocal obligation, but upon an original moral duty enjoined upon every person, *so to conduct himself, or exercise his own rights, as not to injure another.* It is conceded, that where the conduct of the party complained of has been malicious, or his *negligence so wanton and gross* as to be evidence of voluntary injury, the injured party is entitled to redress, although there has been negligence on his part. *Wynn vs. Allen*, 5 W. & S. 524; *Munroe vs. Leach*, 7 Metc. 274; *Farwell vs. Boston and Worcester Railroad Company*, 4 Metc. 49. But where the injury arises neither from malice, design, nor wanton and gross neglect, but simply the neglect of ordinary care and caution, and the parties are mutually in fault, the negligence of both being the *immediate* or *proximate* cause of the injury, it would seem that a recovery is fairly denied, upon the ground that the injured party must be taken to have brought the injury upon him-

self. For the parties being mutually in fault, there can be no apportionment of the damages, no rule existing to settle in such case what the one shall pay more than the other.

This rule, however, that where both parties are in fault, and the negligence of each a *proximate* cause of the injury, has been chiefly applied to cases of collision between vessels, carriages, &c., passing on the public thoroughfares.

The mere fact, however, that one person is in the wrong, does not, in itself, discharge another from the observance of due and proper care towards him, or the duty of so exercising his own rights as not to injure him unnecessarily. There have been numerous adjudications, both in England and in this country, where parties have been held responsible for their negligence, although the party injured was at the time of the occurrence culpable, and, in some of the cases, in the actual commission of a trespass.

In the case of the *New Haven Steamboat and Transportation Company vs. Vanderbilt*, 16 Conn. Rep. 421, the Supreme Court of Connecticut held it to be a principle of law, that while a party on the one hand shall not recover damages for an injury which he has brought upon himself, neither shall he, on the other hand, be permitted to shield himself from an injury which he has done, because the party injured was in the wrong, unless such wrong contributed to produce the injury; and even then, it would seem that the party setting up such defence is bound to use common and ordinary caution to be in the right. This decision was founded on the authority of *Butterfield vs. Forrester*, 11 East, 58, in which Lord Ellenborough said: "A party is not to cast himself upon an obstruction, which has been made by the fault of another, and avail himself of it, if he does not himself use common and ordinary caution to be in the right. In cases of persons riding upon what is considered to be the wrong side of the road, that would not authorize another purposely to ride up against them."

In the case of *Birge vs. Gardiner*, 19 Conn. Rep. 507, where the defendant had set up a gate on his own land, by the side of a lane, through which the plaintiff, a child between six and seven years of age, with other children in the same neighborhood, were

accustomed to pass from their places of residence to the highway ; and the plaintiff, in passing along such lane, without the liberty of any one, put his hands on the gate and shook it, in consequence of which it fell on him and broke his leg—the Supreme Court of Connecticut said : “ There is a class of cases, *in which defendants have been holden responsible for their misconduct, although culpable acts of trespass by the plaintiffs produced the consequences ;*” and held in this case, that if the defendant was guilty of negligence, he was liable for the injury, unless the plaintiff, in doing what he did, was guilty of negligence or misbehaving, or of the want of proper care and caution ; and that in determining this question, it was proper to take into consideration the age and condition of the plaintiff, &c., and that the *fact that the plaintiff was a trespasser in the act which produced the injury complained of, would not necessarily preclude him from a recovery against a party guilty of negligence.* This decision was sustained by the authority of *Lynch vs. Nurdin*, 1 Adolphus & Ellis, 35, (2 Stephen’s Nisi Prius, 1015,) which was an action for negligence committed by the defendant’s servant, in leaving his cart and horse standing for half an hour in an open street, and while there the plaintiff, with other children, got into and about the cart, and teased the horse, which moved, whereby the plaintiff was injured. Lord Denman, C. J., said : “ *In the present case, the fact appears that the plaintiff has done wrong ; he had no right to enter the cart, and abstaining from doing so, he would have escaped the mischief. Certainly, he was a co-operating cause of his own misfortune, by doing an unlawful act ; and the question arises, whether that fact alone must deprive the child of his remedy. The legal proposition, that one who has, by his own negligence contributed to the injury of which he complains, cannot maintain his action against another in respect of it, has received some qualifications. Indeed, Lord Ellenborough’s doctrine, in Butterfield vs. Forrester, which has been generally adopted since, would not set up the want of a superior degree of skill or care as a bar to the claim for redress. Ordinary care must mean, that degree of care which may reasonably be expected from a person in the plaintiff’s situation.*”

The same doctrine was substantially recognized in the case of *Chaplin vs. Hawes et al.*, 3 Carr. & Payne, 554, in which Best, C. J., remarks:

“If the plaintiff's servant had such a clear space that he might easily have got away, then I think he would have been so much to blame as to prevent the plaintiff's recovering. But, on the sudden a man may not be sufficiently self-possessed to know in what way to decide; and in such a case, I think the wrong-doer is the party who is to be answerable for the mischief, *though it might have been prevented by the other party's acting differently.*”

In the case of *Bird vs. Holbrook*, 15 Eng. Com. Law Rep. 91, it was held, that where the defendant, who for the protection of his property, some of which had been stolen, set a spring-gun, without notice, in a walled garden, at a distance from his house, and the plaintiff, having climbed over the wall in pursuit of a stray fowl, was shot, he (the defendant) was liable in damages, although the plaintiff brought the injury upon himself by trespassing upon the defendant's enclosure.

The case of *Vere vs. Lord Cawdor*, 11 East, 567, was an action of trespass for shooting and killing a dog of the plaintiff; in which it was held, that a plea in bar constituted no justification which set forth that the lord of the manor was possessed of a close, and that the defendant, as his gamekeeper, killed the dog when running after hares in that close, which was for the preservation of hares; the plea not averring that it was *necessary* to kill the dog for the preservation of the hares, &c. In this case, Lord Ellenborough, C. J., said: “The question is, whether the plaintiff's dog incurred the penalty of death for running after a hare in another's grounds? And if there be any precedent of that sort, *which outrages all reason and sense, it is of no authority to govern other cases.*”

The same doctrine was recognized in the case of *Marriott vs. Stanley*, 39 Eng. C. L. Rep. 559. Also in the case of *Raisin vs. Mitchell et al.*, 38 Eng. C. L. Rep. 252, in which a jury returned a verdict in favor of the plaintiff for £250, with a *special finding*, on inquiry, *that there were faults on both sides*; and it was held,

that notwithstanding this the plaintiff was entitled to the verdict, *as there might be faults with the plaintiff to a certain extent, and yet not to such an extent as to prevent his recovering.* The same subject was very fully considered in the case of *Deane vs. Clayton*, 2 Eng. C. L. Rep. 183, in which Dallas, J., remarks: "To the next class of decisions I also equally accede; namely, those which establish that you shall do no more *than the necessity of the case requires*, when the excess may be in any way injurious to another, a principle which pervades every part of the law of England, criminal as well as civil, and, indeed, belongs to all law that is founded on reason and natural equity."

It is upon this ground, that where domestic animals, even those which are *breachy* and *unruly*, break through the lawful enclosures of another, the owner of such enclosure, although he has a right of action for the trespass, and has the right to expel the trespassing animals from his grounds, and that quickly and with no very kind treatment; yet in so doing, he is not allowed to use *unnecessary* or *excessive* violence; and if he does, and the animals be *killed* or *injured* thereby, he will be liable to the owner of the animals in damages. And this is in strict accordance with the decision in the case of *Vere vs. Cawdor*, above mentioned. To the same effect is the case of the *Mayor of Colchester vs. Brooke*, 53 Eng. Com. L. R. 376, cited in 1 Smith's Leading Cases, 312, where it was held, that, although the plaintiff was chargeable with wrong and negligence in placing and keeping the deposit of a bed of oysters in the channel of a navigable stream, which created a public nuisance, yet the defendant was not justifiable in running his vessel upon the deposit and greatly injuring the oysters, when there was room to pass in the stream without it, and the injury could have been avoided by the use of reasonable care and diligence. This is only carrying out the rule, that though a man do a lawful thing, yet if any damage thereby be done to another, which he could have reasonably and properly avoided, he will be held liable. So it is said, if a man lop a tree on his own ground, and the boughs fall upon another's premises, *ipso invito*, and do an injury, an action lies. So also, where a man in building his own house, lets fall a piece of timber on his neighbor's

house and injures it. And likewise, where a party so negligently constructed a hayrick on the extremity of his land, that in consequence of its spontaneous ignition, his neighbor's house was burnt down, an action has been sustained, *Vaughan vs. Menlone*, 3 Bing. N. C. 468.

And where persons have the control of dangerous instruments, the law, out of regard to the safety of the community, requires them to be kept with the utmost care. So that, where a party being possessed of a loaded gun, sent a young girl after it with directions to take the priming out, which was accordingly done, but an injury was done to the child of another person, in consequence of the girl presenting the gun and drawing the trigger, when the gun went off, the party was held liable in damages to the person injured. *Dixon vs. Bell*, 5 M. & S. 198.

Another modification of the rule that the concurrence of the plaintiff's negligence with that of the defendant will defeat the claim to reparation, is that where the plaintiff, knowing the danger, voluntarily placed his property in an exposed and hazardous position or in more than ordinary danger from the lawful acts of the defendant. Sedgwick on Damages, 471. This principle was settled by the Supreme Court of New York in the case of *Cook vs. The Champlain Transportation Company*, 1 Denio, 99, in which it was held, that where a person, in the lawful use of his own property, exposes it to the danger of accidental injury from the lawful acts of others, he does not thereby lose his remedy for an injury caused by the culpable negligence of such other persons; so that the owner of land on the shore of a stream, or lake, or adjoining the track of a railroad, may lawfully build on his land, though the situation be one of exposure and hazard, and be nevertheless, entitled to protection against the *negligent acts* of persons lawfully passing the same with vessels or carriages, propelled by steam engines, by which such buildings may be set on fire, on the ground that the owner undertook the risk and hazard of injury by *mere accident*, but not the risk of injury by *negligence*.

But there is yet another element in this class of cases, which occasionally has an important bearing upon the right of redress. The



negligence of the injured party, to preclude him from a recovery, must be in part, at least an *immediate* or *proximate cause* of the injury. To this effect was the decision of the case of *Davies vs. Mann*, 10 Meeson & Welsby, 545.

The plaintiff having fettered the fore feet of an ass belonging to him, turned it into a public highway; and at the time in question, the ass was grazing on the off side of a road about eight yards wide, when the defendant's team of three horses, coming down a slight descent, at what the witness termed a "smartish pace," ran against the ass, knocked it down, and the wheels passing over it, it died soon after. The ass was fettered at the time, and it was proved, that the driver of the wagon was some little distance behind the horses. The learned judge, (Erskine, before whom the case was tried at the Worcester assizes) told the jury, that though the act of the plaintiff, in leaving the donkey on the highway, so fettered as to prevent his getting out of the way of carriages traveling along it, might be *illegal*, still, if the *proximate* cause of the injury, was attributable to the want of proper conduct on the part of the driver of the wagon, the action was maintainable against the defendant, and his Lordship directed them, if they thought the accident might have been avoided by the exercise of ordinary care, on the part of the driver, to find for the plaintiff.

After a verdict for the plaintiff, on a motion for a new trial, which came before the Exchequer, Lord Abinger, C. B. said:

"I am of opinion that there ought to be no rule in this case. The defendant has not denied that the ass was lawfully in the highway, and therefore, we must assume it to have been lawfully there. But even were it *otherwise*, it would have made *no difference*: for as the defendant might, by the exercise of proper care, have avoided injuring the animal, and did not, he is liable for the consequences of his negligence, though the animal *may have been improperly there*."

The Supreme Court of Vermont, in the case of *Trow vs. The Vermont Central Railroad Company*, 24 Vermont Rep. 488, in which this doctrine is discussed and fully sustained, said; "When the negligence of the defendant is *proximate*, and that of the plain-



tiff *remote*, the action can then well be sustained, although the plaintiff is not entirely without fault. This seems to be settled now in England and in this country. Therefore, if there be negligence on the part of the plaintiff, yet if, at the time when the injury was committed, it might have been avoided by the defendant, in the exercise of reasonable care and prudence, an action will lie for the injury. So in this case, the plaintiff was guilty of negligence or even of positive wrong, in placing his horse in the highway, the defendant was *bound to exercise the reasonable care and diligence* in the use of its road, and management of the engine and train, and if for want of that care, the injury arose, the defendant is liable."

From a review of the decisions on this subject both in England and in this country, the following conclusions appear fairly deducible:

That the general rule is, that where the parties are mutually in fault, or in other words where negligence of the *same nature* in each party has co-operated to produce the injury, the party sustaining the loss, is without remedy: but that this rule is subject to the following qualifications:

1st. The injured party, although in fault to some extent at the time, may, notwithstanding this, be entitled to reparation in damages for an injury arising from the negligence of another, which could not have been avoided by the exercise of ordinary and reasonable care on the part of the injured party.

2d. Where the negligence of the defendant is the *proximate cause* of an injury, but that of the plaintiff only *remote*, consisting of some act or omission not occurring at the time of the injury, the action for reparation is maintainable.

3d. When a party has in his custody or control dangerous instruments, or means of injury, and negligently uses them, or places them in a situation unsafe to others, and another person although in the commission of a trespass, or otherwise somewhat in the wrong at the time, sustains an injury thereby, he will be entitled to redress.

4th. And where the plaintiff, in the *ordinary exercise of his own rights*, allows his property to be in an exposed and hazardous position, and it becomes injured by the neglect of ordinary care and cau-

tion on the part of the defendant, he is entitled to reparation, for the reason, that, although by allowing his property to be exposed to danger, he took upon himself the risk of loss or injury by *mere accident*, he did not thereby *discharge* the defendant from the duty of observing *ordinary care* and *prudence*, or in other words voluntarily incur the risk of injury by the *negligence* of another.

The application of these rules, which appear *reasonable* and *just* removes all difficulty in the disposition of the case before us. The act of the plaintiff, allowing his hogs to be at large in the neighborhood of the railroad, where they were exposed to the danger of getting upon the railway track and being injured, if it could be said to be tributary to the injury at all, was only a *remote cause* of the injury, and in the voluntary exposure of his property to danger, in the exercise of his lawful rights, he took upon himself the risk of injury to his property by *mere accident*, but not the risk of injury by the defendants' *negligence*. And the defendant was chargeable with some degree of negligence, at least by the omission to have its railroad enclosed by suitable fences and cattle guards. On this subject, the Supreme Court of Vermont, in the case of *Trow vs. The Vermont Central R. R. Co.* before mentioned, say: "The duty of maintaining fences and erecting cattle guards for such purposes, is imposed on the corporation not only as a matter of safety in the use of their roads and running their engines thereon, but also, as a matter of security to the property of those living near and contiguous to the road. And this arises from the consideration that they must know and reasonably expect that without such precautions, such injuries will naturally and frequently arise. And when for the distance mentioned in this case, no precautions of that kind were used upon this road, and in a place so public and common, we think as a matter of law, there was that neglect which will render the corporation liable for injuries arising solely from that cause."

This is in accordance with the decision of the same court, in the case of *Quimby vs. The Vermont Central Railroad Co.* 23 Vermont R. 388, in which it was held, that although the charter of the Company made no provision in reference to the obligation to maintain fences upon the line of the road, the general law of the state, in

reference to the obligation of adjoining land owners to maintain the division fences between them, did not apply, but that the obligation to maintain the fences rested primarily upon the company, and until they have either built the fences, or paid the land owner for doing it, a sufficient length of time, to enable him to do it, the *mere fact*, that cattle get upon the road from the land adjoining, is no ground for imputing negligence to the owners of the cattle." So also, the case of "The matter of the Rensselaer and Saratoga Railroad Company, 4 Paige, 553.

It being the right of the owners of animals in Ohio, to let them be at large, it follows, that the *mere fact* of allowing them to be at large generally, cannot be a ground of imputing negligence to the owner. But where the owner allows them to be at large in the immediate vicinity of an unenclosed railroad, where they will be liable to wander upon the railroad, he cannot be said to exercise that *high* degree of care and prudence in reference to his own interests, which men of *more* than ordinary care and caution, take of their own property. And admitting the plaintiff in this case, to have been chargeable in some slight degree with negligence, in this respect, yet the defendant was certainly chargeable in at least an equal degree of neglect for want of proper care in enclosing its railroad with fences and cattle guards. The construction of the railroad could not abridge or take away the existing right of the people of the State to allow their animals to be at large, although the danger which it created may have enjoined more care and prudence on the owners of animals with regard to their own interests in letting them be at large in the immediate neighborhood of the railroad. But the Company having constructed its road through a country, where it was well known that domestic animals were suffered to run at large, and where the custom and right in this respect, must be unquestionable, the consideration of the inevitable exposure of the road while unenclosed, to such casualties and injuries, as that of animals running at large, getting upon it, enjoined upon the Company the exercise of at least some degree of care and caution, the duty of enclosing its road. And by the omission of this, the defendant was *at least* as much in fault, and at least as much chargeable with negligence,

as the plaintiff. And in each case, that is, in allowing the animals to be at large by the plaintiff, and in having the railroad unenclosed by the defendant, the *negligence* was *remote*, each only *remotely* or *consequentially* contributing to cause the injury. If there had existed no other negligence than this on either side, and the loss had occurred from unavoidable accident in running the train upon the hogs, when the agents of the Company were in the full exercise of due care and caution, in the discharge of their duty, the plaintiff would probably have been without redress. The turning point of this cause therefore, as presented, would seem to be, not whether there was negligence on the part of the plaintiff in allowing his hogs to be at large, or negligence on the part of the defendant in omitting to enclose its road by fences and cattle guards, but whether the agents of the defendant, at the time of the occurrence, *exercised reasonable and ordinary care to avoid the injury*. Having left its road unenclosed, and exposed to the intrusion of animals at large coming upon the track, it was the duty of the company, acting through its agents, to use ordinary and reasonable care and diligence to avoid all unnecessary injury to the animals found accidentally in the way of its train upon the road. What amounts to ordinary care on the part of the agents of the company, depends on the peculiar nature of the employment, and the circumstances attending the transaction. The defendant's agents were engaged in the management of powerful and dangerous machinery moving with great rapidity, to the skillful and safe conduct of which, is entrusted not merely property, but the safety of human beings, to a large extent. The first and paramount object of the attention of the agents of the company, is a proper regard for the safety of the persons and property in their charge on the train. The plaintiff had no right to expect his property, under the circumstances, to be protected unless it could be done consistently with the higher obligations and responsibilities resting on the agents of the defendants. In this particular employment a higher degree of skill and diligence is exacted of the persons engaged, than that which is requisite in the ordinary pursuits of life. For the protection of the persons and property of individuals in charge of the

agents of the defendant, on the train of cars, the company was held to a high degree of care and diligence ; and with a due regard to this paramount duty, they were bound to the exercise of what, in that peculiar employment, would be ordinary and reasonable care to avoid doing any unnecessary injury to the property of the plaintiff which happened accidentally to be upon the railway track.

The Court of Common Pleas, however, in this case, refused upon request, to charge the jury, that the agents of the defendant were held to the exercise of *ordinary care and caution* to avoid injury to the plaintiff's property thus upon the railroad ; but on the contrary, charged that the hogs, being unlawfully on the road, the defendant's agents were not required to check the speed of the train and avoid injury to the animals, even if they could easily and readily have done so.

This ruling of the Court of Common Pleas is in direct conflict with the doctrine of Lord Ellenborough, in the case of *Vere vs. Cowdor*, in which he said, "that the idea, that the plaintiff's dog had incurred the penalty of death, by running after a hare on another's grounds, *outrages all reason and sense ;*" in conflict with the doctrine, that even in case of a trespass, no *unnecessary and excessive* violence shall be used to the injury of another, a principle, which Dallas, J. said, "*pervades every part of the law of England, criminal as well as civil ; and indeed belongs to all law that is founded on reason and natural equity ;* contrary to the humane spirit of our law against cruelty to animals ; contrary to the doctrine, that a man in the exercise of his lawful rights, shall use reasonable and ordinary care to avoid injury to another ; and contrary to the whole course of adjudication in England and in this country generally, on *mere questions* of negligence.

But it is due to the court below, to say, that its charge to the jury, was in strict accordance with the decisions in New York, Pennsylvania, and perhaps those of several other states, in cases of suits against railroad companies upon grounds similar to that, for which this suit was brought. But the decisions in those states all rest upon the ground, that it is *unlawful* for the owners of domestic animals to allow them to be at large ; and that when they

are at large, and happen to stray upon a railroad, the person in charge of trains on it, are absolved from the duty of using care to avoid unnecessary injury to them. It has been shown that this doctrine has no application in this state; those decisions, therefore, are of no authority here. We recognize the maxim, *Sic utere tuo ut alienum non lædas*, as a principle, founded in justice, and essential to the peace, order, and well being of the community; as applicable to the enjoyment of all property, and the exercise of all rights incident thereto, to the protection of which the *weakest* are entitled, and from the observance of which, the most *powerful* are not exempt.

For the error in the charge of the court below to the jury, the judgment is reversed, and the cause remanded for further proceedings.

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*In New Jersey Chancery, October Term, 1854.*

JOHN D. GLOVER AND OTHERS vs. ALEXANDER A. POWELL AND OTHERS.

Bill for Injunction.

1. In 1760, the Legislature of New Jersey authorized certain owners of meadow lands along Little Timber Creek to dam the said creek. Such act is constitutional, and vests an interest; it is more than a mere license, and cannot be revoked by the State.
2. The Legislature must be the sole judge and arbiter in determining what streams shall be navigable, and when they may be obstructed and their navigation destroyed for public necessity or convenience.
3. An individual cannot question the legislation of the State as to the rights of navigation, unless he can call to his aid the paramount authority of the general government.
4. What constitutes a navigable stream.
5. In 1854, the Legislature passed an act for the removal of the dam erected and continued under the act of 1760; the act of 1854 violates the Constitution of the State, and an injunction will be granted by this Court to restrain any action under it.
6. A forfeiture cannot be declared by the Legislature, it can only be done by the Courts in due process of law.

The bill alleges that the complainants are the owners in severalty and in fee simple of about 128  $\frac{63}{100}$  acres of meadow land, situate in the township of Union, in the county of Camden, on both sides of a small stream of water, called Little Timber Creek, emptying into the River Delaware, five miles below Camden City; that the said meadow was reclaimed from the tide waters of the Delaware some time in or previous to the year 1760, by the owners of the said meadow, who at their own expense erected a dam about a quarter of a mile in length at the mouth of the creek, with sluices and other water works in the dam so as to exclude the tide from the meadow and drain the water therefrom, and by digging ditches; and have thus greatly improved the meadow. That the expenses of such dam and improvements have cost not less than \$8,000; that to remove the said dam would wholly destroy the value of the meadow and improvements; that the said creek is about 125 feet wide at its mouth, that it gradually becomes narrower as you pass up it; that if the dam should be removed, the tide would flow up about two miles; that its depth varies,—at some places it would probably be entirely bare at low water, and at other places five or six feet in depth, and that it never was or could have been, and would not now, if the said dam should be removed, be of any material importance for purposes of navigation; that the complainants are unable to state by what authority the dam and water works were originally erected, but that on the 20th day of November, 1760, the Legislature of the Colony of New Jersey passed an act entitled “an Act to enable the owners and possessors of meadow lying in Little Timber Creek, in the county of Gloucester, to support and maintain a certain bank, dam, and other water works lately erected across said creek, in order to prevent the tide from overflowing the same, and to keep the former water course of said creek open and clear.” That the said dam and water works so authorized by said act were duly erected, and are still kept up by the owners of said meadow, and that by taxes levied from time to time upon the said owners and their lands, under the said act the said dam and water works have ever since been maintained, and the water course kept open and clear. That the said dam and water works are the absolute property of



the complainants, and that it is not competent for the Legislature of New Jersey to require or authorize the said works to be removed without providing compensation. That the Legislature of New Jersey, at its last session passed an Act entitled "an Act to restore the navigation of Little Timber Creek, in the township of Union, in the county of Camden," as follows, to wit:

*"Be it enacted by the Senate and General Assembly of the State of New Jersey, That Little Timber Creek is hereby declared to be a public highway, in all respects as fully as it was before the said creek was dammed at the mouth or entrance thereof into the River Delaware, and the Township Committee of said Township are hereby authorized and required at the expense of said township to remove the said dam, and thereby open the navigation of the said Little Timber Creek, on the first day of September, 1854."*

The bill further alleges that the said act is unconstitutional and void, because it does not make and provide compensation to the complainants for the injury they will sustain by the removal of the dam. That the defendants, who are the said Committee, intend on the first of September to remove the dam and water-works. The bill prays that the defendants and their successors in office may be restrained from moving the said dam or any part thereof, and thereby or otherwise opening the navigation of said Little Timber Creek.

A copy of the Act of 1760 was annexed to the bill.

On filing the bill, the complainants applied to the Chancellor for an injunction. The Chancellor ordered a copy of the bill of complaint to be served on the defendants, and a rule to show cause on a day and at a place therein mentioned, why an injunction should not issue.

The defendants filed a joint and several answer.

The answer alleges, that before the said dam was erected, the tide did flow up said creek for more than two miles, so that the said creek was, for that distance, navigable for scows, barges, shallops and other flat-bottomed vessels, of not less than twenty-five tons burthen, and of a depth, for that distance, of not less than five or six feet, and for the greater part of that distance of a much greater



depth, and which, if said dam had not been erected, would have been of material importance for navigation. That they do not believe the said dam was erected by authority of law, but charge that the said dam and water works were erected by the unauthorized and illegal action of the owners of said meadow, for their own private purposes, without regard to the navigation; and were, when originally erected, and until sanctioned by the Act of 1760, a preasure and nuisance, liable to be at any time abated. That in 1760, the navigation of said creek, being supposed to be of little immediate importance, the Legislature passed the act referred to, subject to the provisoes and conditions therein contained; that the said Act made it the duty of the said land owners to keep the water course of the creek between certain dams mentioned in the said Act, and comprising the navigable part of said creek, open and clear, so as to give the water a sufficient fall from off the meadows at the head of the same; which condition and proviso of said Act was essentially necessary, as well to preserve the channel of said creek for future use for navigation, as by maintaining the drainage of said meadows to prevent the water from becoming stagnant and injurious to the health of the adjacent country. That the said Act gave no right of property, absolute or otherwise, as against the public, and the then Colony of New Jersey, to the said owners of said meadows, dam and water works, and in and to the bed of the said creek, but was simply a license or toleration of a nuisance, and authorized the continuance of the said dam for the purpose of draining the meadows during the pleasure of the said Legislature, the said license being liable to revocation whenever the public interest required it.

The answer further alleges that the natural water course of said creek has not been kept open and clear, according to the terms of the Act; that in consequence of this neglect, the water has become stagnant, the meadows deteriorated in value, and the health of the inhabitants of the adjacent country, and more particularly of the city of Gloucester, has been greatly injured, and the said stagnant waters have become a nuisance highly injurious to the inhabitants; that in the opinion of said defendants, if the said dam were removed, the meadows would be improved by the deposits, &c.; that

the said dam is so injurious to the health of the inhabitants as to require its abatement; that the settlement and opening of the country, and the increase of the population adjacent to the creek, making the navigation of increased importance, and the nuisance requiring the opening of the creek to the tide, the Legislature, at its last session, passed the Act recited in the bill of complainants; they admit that they are the township committee, and that as such officers, and as agents of the Legislature, they submit that the Legislature have a right to direct the dam to be removed, &c.

Counsel were heard on both sides.

*A. Browning* and *W. L. Dayton*, for complainants, insisted—

*First.* That the legislature have power and authority to authorize the damming of small navigable creeks, *Wilson et al vs. Black Bird Creek Marsh Co.*, 2 Peters, 245; *Cox vs. State*, 3 Blackford, 197; *Sinickson vs. Johnson*, 2 Harr. 152.

That the power had been frequently exercised by the legislature, *Leaming & Spicer*, 554, *Allison's Laws of N. J.* under word *Marsh* 52 acts are found of this character, *Gifford's Index*, letter D.

*Second.* The act of 1760 has the same force and effect as if it authorized the original erection of the dam, 2 Kent, 616; 3 U. S. D. 244, title Principal and Agent, § 273-4-5.

*Third.* The power in the State is based upon the principle, that in the State is vested the right of property in the bed of the river, *Angell on Tide Waters*, 20-22. The dam is the private property of the individual who erected it.

*Fourth.* The Act is unconstitutional. Art. 1, § 16 of the Constitution of N. J. declares, "Private property shall not be taken for public use without just compensation." And again, Art. 4, section 7, p. 9, "Individuals or private corporations shall not be authorized to take private property, for public use, without just compensation first made to the owners."

*Fifth.* Vested rights of property acquired by virtue of a statute cannot be divested by repeal of the statute, *Benson et al vs. The Mayor, &c., of New York et al*, 10 Barb. 223.

*Sixth.* Where a license is executed, and the licensee has acquired rights, the license cannot be revoked so as to divest those rights, without compensation, 7 U. S. D. Tit. License, 346.

They also cited, 2 Harr. 314, 3 ib. 200 ; Angell on Water Courses, 100, 1 Conn. 382 ; 1 Baldw, 205 ; 2 J. C. C., 162 ; 4 W. C. C. R., 601.

*T. P. Carpenter* and *J. F. Randolph*, for defendants, contra cited Hargrave's Tracts, 8, 9 ; Woolrych on Water Courses, 40 ; Angell on Tide Waters 80, 89 ; *Arundill vs. McCullough*, 10 Mass. 70, Saxton R. 380 ; *People vs. Saratoga R. R. Co.*, 15 Wend. 135 ; 2 Black. Com. 347 ; 2 Zab. R. 647 ; *Charles River Bridge*, 11 Peters, 544 ; *Providence Banks vs. Billings*, 4 Peters, 514 ; Chitty's Pre-rogative, 391 ; 15 Vin. 94, License, E, note ; 6 Watts & Serg't, 101 ; 9 ib. 9 ; *Rundel vs. D. & R. C. Co.*, 1 Wallace, Jr. 275 ; Same case, 14 How'd, 80 ; 13 Conn. 87 ; 2 Am. L. Ca. 506 ; 11 Metcalf, 55 ; 2 Denio, 461 ; 1 Waterman's Eden on Injunc. 138, (note 1).

WILLIAMSON, Chancellor.—When this bill was filed and on application for an injunction, an order was made, that a copy of the bill should be served on the defendants, and that they should show cause, on a day named, why an injunction should not issue. The defendants availed themselves of the opportunity thus afforded of putting in their answer to the bill, and of being heard by their counsel in opposition to the application.

The bill is purely an injunction bill, and asks that the defendants may be perpetually restrained from demolishing a dam and water works connected with it, at the mouth of Little Timber Creek, in the County of Camden.

Little Timber Creek is a small creek emptying into the river Delaware, about five miles below the city of Camden. The tide, when not obstructed, ebbs and flows about two miles up the creek. Sometime in, or previous to the year 1760, the owners of the meadow land adjacent to the creek, for the purpose of improving their meadows by the exclusion of the tide water, built a dam of about a quarter of a mile wide at the mouth of the creek, with sluices and other fixtures. In November, 1760, the legislature of the then Colony of New Jersey, passed an Act to enable the owners of meadows along the creek to support and maintain this dam and fixtures, erected for the aforesaid purpose. The Act, after reciting the erection of the dam and its purposes, enacted that the said bank,

dam, and all other water works already erected, or which should thereafter be found necessary to be erected, for the more effectual preventing the tide from overflowing the meadows lying on the said creek, should be erected, supported and maintained at the equal expense of all the owners and possessors of the meadows, according to the proportion that each of the said owners or possessors then or thereafter, might hold on the said creek between certain points in the Act designated.

It further enacts, that the natural water course of the creek should be kept clear, and specified the manner in which it should be done. It then provides for the election, by all the land owners, yearly, of two managers, and empowers these managers to assess the owners and possessors of the meadows in such sum or sums of money, as shall be by them, or the survivor of them, deemed necessary for the supporting, repairing and maintaining the bank, dam, and other water works. It confers upon the managers power to collect the assessments by suit at law; or, if the owner of the meadow assessed is absent, and beyond the reach of legal process, it provides for the leasing of his land for the purpose of paying such assessment. There are other provisions of the Act to carry out its important object, viz: to make it compulsory on all meadow owners, whose lands are benefited and rendered more valuable by the dam and works, to contribute to repair and maintain them. This Act was accepted by the owners of the meadows. Managers were elected under it, and under and by virtue of its provisions the bank, dam, and water works have been repaired and maintained to this day. It is alleged that upwards of eight thousand dollars have been expended on the works,—that the value of the meadows has thereby been greatly enhanced, and that the demolishing the dam would destroy this value.

The Legislature, at its last session, passed an Act declaring Little Timber creek to be a public highway, in all respects as fully as it was before the said creek was dammed at its mouth; and the township committee is authorized and required, at the expense of the township, to remove the dam, and thereby open the navigation of the creek, on the first day of September next. It is to enjoin the

township committee of the township of Union, in the county of Camden, from discharging the duty imposed upon them by this Act, that this bill is filed.

In the first place, it is insisted that the dam at the mouth of Little Timber creek destroys the navigation of a navigable stream where the tide ebbs and flows, and that the Legislature have no right or power to authorize such an obstruction.

It appears from the pleadings, that at certain states of the tide, this creek, if unobstructed, is navigable by small flat-bottomed boats for at least two miles from its mouth. It does not appear that it ever has been used for the purposes of navigation. It has not been navigated since the year 1760. There is no allegation on the part of the defendants, and nothing in the case to show that its navigation *now* is demanded by the public interest, or that, as a navigable stream, it would be any way beneficial to the public for the purposes of trade or agriculture. Admit, for the sake of the argument, that the State Legislature has not the power permanently to obstruct or to destroy any navigable river within its territorial jurisdiction, it does not follow that any creek, or rivulet, in which the tide ebbs and flows, and which may be used at certain tides by small boats for individual convenience, is to be dignified with the appellation of an arm of the sea, or navigable river, and as such, beyond the jurisdiction or control of the Legislature, except as a public highway. Washed, as more than two-thirds of the borders of our State are by the sea, and by the rivers Hudson and Delaware, and their bays, the small creeks and rivers made by the force of the tides into the upland, in extent from a mile to six miles, are almost innumerable. At high tides many of them may be navigated with small flat-bottomed boats, and have been occasionally used with advantage by individuals owning the adjacent meadows, for the transportation of grass and perhaps other articles of merchandise. Many of them have been cut off from the sea under the express sanction of the Legislature, for the purposes of reclaiming and improving the adjacent meadow land and extending public roads, and the navigation of many more has been totally destroyed without any legal authority, and no complaint made by the public or by in-

dividuals, on account of the manifest advantage resulting to the public from the obstruction. Most certainly a court of justice would not be justified in declaring that there is no authority in the State to determine when such streams shall be considered as navigable rivers, and be maintained and protected as such, or to determine when they may be obstructed, and their navigation destroyed for the public necessity or convenience. The Legislature must be the sole judge and arbiter for the public in this matter, and courts have no right to question this authority. In the exercise of powers conferred by the Constitution upon the General Government, questions may arise between it and the State governments; but no individual can question the legislation of the State in reference to what is called common rights of navigation, unless he can summon to his aid in some way the legislation of the General Government, which is of paramount authority. The authorities will, I think, be found to sustain this doctrine. Some will be found to go much further, and to declare that the mere fact of the tide ebbing and flowing, and of the channel being such as to make the creek navigable at certain periods of the tide, does not entitle it to the protection of the court as a public navigable river. In the case of *The King vs. Montague and others*, 4 B. & C. 596, 10 E. C. L. 413, it was decided that a public right of navigation in a river or creek may be extinguished either by an act of Parliament, or writ of *ad quod damnum*, and inquisition thereon, or under certain circumstances by Commissioners of Sewers, or by natural causes, such as the recess of the sea, or an accumulation of mud, &c., and where a public road, obstructing a channel (once navigable) has existed for so long a time, that the state of the channel at the time when the road was made, cannot be proved, there is a presumption in favor of the existing state of things, and it must be presumed that the right of navigation was extinguished in one of the modes before mentioned, and the road cannot be removed as a nuisance to that navigation. In the case of *The Mayor of Lynn vs. Turner*, Cowp. 86, which was a suit brought against the Corporation of Lynn for not repairing and cleansing a certain creek, into which the tide of the sea was accustomed to flow and reflow, Lord Mansfield, on the argument,

asked counsel, "How does it appear that this is a navigable river? The flowing and reflowing of the tide does not make it so, for there are many places into which the tide flows, which are not navigable rivers, and the place in question may be a creek in their own private estate."

The flux and reflux of the tide is *prima facie* evidence of a navigable river, but it is not conclusive evidence, *Miles vs. Rose and another*, 5 Taunt. 706. The strength of this *prima facie* evidence, says Bayley, J., in the case of *Rex vs. Montague*, arising from the flux and reflux of the tide, must depend upon the situation and nature of the channel. If it is a broad and deep channel calculated for the purposes of commerce, it would be natural to conclude that it has been a public navigation; but if it is a petty stream, navigable only at certain periods of the tide, and then only for a very short time and by very small boats, it is difficult to suppose that it ever has been a public navigable channel. In *Commonwealth vs. Breed*, 4 Pick. 460, an information in the nature of a *quo warranto* was filed by the direction of the Legislature, alleging that Breed, the respondent, had erected and still maintains a bridge across a navigable arm of the sea between Chelsea and Belle Island, whereby the passing of vessels is obstructed, and requiring him to answer by what authority he claims to keep up and maintain the bridge. The respondent set up a law of Massachusetts, passed in the year 1816, which authorized him to build a bridge convenient for the accommodation of the proprietors of Belle Island; that it should be built with a draw not less than 15 feet wide; that the proprietor should at all times, when necessary, have the draw raised at his own expense for the convenient passing of vessels through the same. The Solicitor General replied, that the statute granted the respondent the privilege of erecting a bridge for the private accommodation of passing and repassing to and from the island, the same being the private estate of the respondent, and that the grant was not for any public easement or convenience; that it was the interest of the state that the draw should be of sufficient width to permit the convenient passing of all such vessels as had been accustomed to

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navigate the inlet before the erection of the bridge, and with such necessary piers, &c.

The respondent rejoined that he had complied with the provisions of the statute, and thereupon issue was joined. The jury found, that the water above the bridge was navigable for coasting vessels of one hundred tons burthen, and was used before the building of the bridge, and that the draw was not of sufficient width. The Court said the Legislature are to determine when the public convenience and necessity require such an obstruction to navigation, and upon what terms and conditions it shall be allowed.

In the case of *Rowe vs. Granite Bridge Corporation*, 21 Pick. 344, the Company were authorized to construct a road from Milton to Dover; and to locate, build and construct a bridge across Neponset River in continuation of the line of the road. The plaintiff was the owner of a piece of salt meadow in Milton. He alleged that from time immemorial there had been a creek commencing at the highest part of the marsh, and passing through it to Neponset River, which creek was of sufficient depth and width to admit boats, gondolas, and light craft to pass up and down the creek in common tides, and that such craft might be used to advantage in removing the crops of hay from the marsh, that the defendants had laid out their road over the marsh and across the creek, and were proceeding to fill up the creek. An injunction was asked to restrain them. The Court decided that a creek in a salt meadow, in order to be deemed navigable must not be merely sufficient to float a small boat at high water, but must be navigable generally and commonly to some purpose useful to trade and agriculture. C. J. Shaw, in giving the opinion of the court, says, "It is not every ditch, in which the salt water ebbs and flows through the extensive salt marshes along the coast, and which serve to admit and drain off the salt water from the marshes which can be considered a navigable stream. Nor is it every small creek, in which a fishing skiff or a gunning canoe can be made to float at high water, which is deemed navigable. But in order to have this character, it must be navigable to some purpose, useful to trade and agriculture. It is not a mere possibility of being used under some circumstances, as at extraordi-



nary high tides, which will give it the character of a navigable stream, but it must be generally and commonly useful to some purpose of trade or agriculture."

In the case of *Thompson, Wilson and others, plaintiffs in error vs. the Black Bird Creek Marsh Company, defendants*, 2 Peters, 245, Black Bird Creek, in the State of Delaware, was navigable for schooners of upwards of ninety tons burthen; under an act of the State of Delaware, the defendants constructed a dam across the creek by which the navigation was obstructed. The court decided that the act of the Legislature authorizing the dam was not in violation of the Constitution of the United States.

There can, I think, be no doubt that the Legislature had the power to authorize the erection of a dam at the mouth of Little Timber Creek. There is nothing in the case to show that it ever was a navigable stream, or that a boat of any size ever passed up it.

The defendants further insist, that the dam having been originally made and constructed without the authority of the State, the true construction of the act of 1760 is to give to the defendants not a grant of any right which belonged to the state but a mere *license* to continue a *nuisance* already existing, and that this license was revocable at pleasure.

It may well be questioned upon the case presented to the court, whether this dam was originally a nuisance, and whether it could not be maintained without Legislative sanction. If it was not a navigable river, then it might be obstructed without the authority of the Legislature; and although the fact of the ebb and flow of the tide is *prima facie* evidence of its being a navigable river, it may be doubted whether the case presented does not overcome such evidence. At any rate, if the question for injunction turned upon that point, the court would not permit the defendants to be deprived of their property without affording them the opportunity of overcoming such evidence.

But while it is true that the dam was not originally erected under the act of 1760, the construction of this act contended for by the defendants cannot be admitted. The dam has been maintained under that act for nearly a century. The act did not authorize the

owners of the meadows simply to *continue* the dam, but it gave the authority of the State to compel its continuance. It has not been continued by the voluntary act of individuals, but they have been compelled to maintain it by the power and force of law.

This act created a *quasi* corporation, provided for the annual election of managers, conferred upon them power to assess property, and clothed them with authority to enforce these assessments. How then, with any propriety, can it be said, that this act was a license only to continue a nuisance already existing?

Whether this act can be repealed at pleasure so as to deprive parties who have acquired rights under it, is the important question upon which this case turns.

The act of the Legislature passed the 17th March, 1854, which authorizes and requires the Township Committee of the township of Union to remove the dam, is in violation of the Constitution of the United States, which declares that no State shall "pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." It is a virtual repeal of the act of 1760. The last named act was a grant, and granted valuable powers to the owners of meadows along Little Timber Creek. In the Dartmouth College case, Justice Story remarks, "A grant of franchise is not, in point of principle, distinguishable from a grant of any other property. If, therefore, this charter were a pure donation, when the grant was complete and accepted by the grantees it involved a contract that the grantees should hold, and the grantors should not reassume the grant, as much as if it had been founded on the most valuable consideration."

Under the provisions of the act of 1760 rights have become vested, and valuable property has been acquired. These powers and this property have been enjoyed under the protection of this act, for nearly a century past. The state has participated in the benefits conferred. The property acquired under the act, has been taxed for the support of the State and Municipal Governments. It is in violation of good faith, it impairs the obligation of a contract which has been enjoyed to the mutual benefit of both parties, and it is therefore repugnant to the Constitution of the

United States. It is in direct conflict with repeated judicial decisions declaring similar acts void. *Fletcher vs. Peck*, 6 Cranch, 87; *State of New Jersey vs. Wilson*, 7 Cranch, 164; *Dartmouth College vs. Woodward*, 4 Wheat. 518; *Terrett and others vs. Taylor and others*, 9 Cranch, 43; Story's Com. on the Constitution of the United States, vol. iii. 256.

The act of 1854 is also repugnant to the Constitution of the State of New Jersey. Art. 1, sec. 16, declares, private property shall not be taken for public use, without just compensation, and Art. 4, sec. 7, p. 9, individuals or private corporations shall not be authorized to take private property for public use, without just compensation first made to the owners. The dam and water works in question are private property. They have been constructed, maintained, and paid for, by the owners of the meadow along the creek. They have been acquired under the express sanction of law. The value of the meadow is destroyed by the execution of the law in question, and thus may be said with propriety to be taken from the owners. A partial destruction, or a diminution in its value is the taking of private property. This act cannot be carried into effect without a violation of the Constitution of the State.

But to avoid the force of these objections to the act, the defendants set up in their answer, that this dam is a nuisance; that the conditions contained in the act, and upon which the rights and privileges of the act are secured to the defendants have been violated, and that therefore the Legislature have ordered and have a right to authorize and direct the removal of the nuisance. But the defendants must justify themselves and can only justify themselves, under the act. The act declares the object to be to restore the navigation of the creek. The act can be executed for no other purpose.

But suppose the conditions of the act to have been violated, and that the grant has been forfeited, the forfeiture must be declared by due process of law. The Legislature have no right to condemn the defendants unheard, and deprive them of their property in this summary way. If they can do it in this case, then may they repeal every act of incorporation on the statute book upon the

same pretext. The injunction must issue. I am aware of the responsibility assumed by the court in interposing to prevent the execution of an act of the Legislature; but the complainants have appealed to this court for protection, and I may not shrink from the duty they have imposed upon me.

Injunction issued.

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## LEGAL MISCELLANY.

### LEGAL PRINCIPLES.

#### No. V.

In our last number we drew from the case of *Morris vs. Miller*, in which the leading opinion was delivered by Lord Mansfield, an illustration of the truth, that what a judge says in pronouncing the judgment of the Court, is not necessarily, nor always law, though the decision itself be correct. It was our purpose, in the present number, to deduce a further illustration from a very recent American case, correctly decided, in which the opinion of the Court was pronounced by an eminent living judge. But on reflection, we fear that our views for making the selection might be misapprehended, awaking unpleasant feelings not intended to be awakened, and thus that an injury would follow, overbalancing the good. When men are dead, and a certain time has been given for their bones to bleach and dry, we are all at liberty to overhaul and rattle them as we will; but until then, great caution and circumspection are required.

That a judicial *dictum* is not entitled to the weight of authority, is a very common observation, the truth of which needs not to be enforced. But the matter we wish to bring out, lies deeper. The remarks of Lord Mansfield, to which we called attention in our last number, were not what are usually understood to be *dicta*, but they were the very words in which the precise judgment of the Court was pronounced, being as much the essence of the decision as any

words could be. Still, even such words, expressive as they are of the reasons or principles on which a case is decided, do not, though the decision itself be just, always truly reflect the law.

The point we had thought more particularly to illustrate in this number, if we had selected the case we proposed to ourselves, is, that judges frequently state several distinct and independent reasons for a decision, upon any one of which we are led to understand they consider the case might alone repose; but on examination it will appear that a part only of these reasons are sound. Here the decision is correct; the reasoning accompanying it is good in part, and vicious in part. And the thing concerning which we wish to interpose a caution, is not to take, without examination, such reasoning as being just. A decision, indeed, may not be right; but it is very much more likely to be so, than the entire reasoning of the Court on the point; while the decision is, in the locality where pronounced, a legal authority, but the reasoning is not.

It may appear to a person who does not please to reflect, that the reasoning and conclusion are so connected, that both, like the voice and echo, must bear one character as right or wrong. This, however, is far from being so. Men do not know always, and perhaps we might say usually, what it is that influences their own judgments. If they do know, they do not always, and perhaps we may here also say usually, mention the real thing, when called to state their reason. Let it not be said that this observation is a sweeping charge of dishonesty; for it is not so. When a man does what we have thus stated, his act bears a character somewhat approximating, to say the least, towards the dishonest; yet he does not really mean it so, but he means to state what he thinks will be most satisfactory to the person he addresses.

Now, this same thing enters, to a greater or less degree, into the legal opinions of judges; and we must, therefore study them with the allowance and the caution thus indicated. If a judge, for example, pronounces an opinion which he supposes is to be carefully read and examined by a highly cultivated and intelligent bar, in the midst of whom he officiates, it will be more free from the blemishes we are speaking of, than if pronounced to an ignorant bar, or to non-pro-

professional men. Of course, it is of the highest importance to the adjudication, that the case should have been well argued; but we are here supposing it to have been equally well argued in both instances. And in this observation we impute no corruption to judges; but only state a fact relative to the workings of the human mind.

Besides, we should remember that a judge has no better opportunity to know what is a legal principle, than the humblest man in the ranks of the profession. This knowledge depends upon the person's natural capabilities and his experience, study and reflection. We think we have sufficiently shown that Courts do not decide principles, but cases, though, of course, in deciding the latter, they must have a certain recognition of the former.

While in these observations, we are endeavoring to correct a too common error in the minds of professional men, we trust that our meaning will not be misapprehended. It is of the highest importance in studying cases, to look into the reasoning of the Court. The necessity of this is so apparent to any professional man, that it need not be enforced. But, at the same time, we cannot use too much caution against being led astray by false lights.

J. P. B.

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### THE DEATH OF THE HON. THOMAS DAY.

The Hon. THOMAS DAY died at Hartford, Conn., March 1, 1855. The pages of this journal have been enriched, on more than one occasion, by important legal matters from his pen. Mr. Day was born on the 6th of July, 1777, and was a descendant in the sixth generation from Robert Day, who came to Massachusetts in 1688.

The editorial labors of Thomas Day commenced as early as 1805, when he began to report regularly the Decisions of the Supreme Court of Errors; but he took notes of cases in the latter half of the 18th century, and his reports cover a period ranging through more than half a century. At the June Term, 1853, he declined a re-appointment, and the Supreme Court of Errors were pleased to express their high respect for his eminent services and exalted character, and to thank him for his advancement of juridical science through his numerous reports, and other legal produc-

tions, and for his uniform kindness and courtesy in all his intercourse with the bench and the bar. He edited several English law works, in all about forty volumes, in which he introduced notices of American decisions, and made other improvements.

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### NOTICES OF NEW BOOKS.

**Digest of the Decisions of the Supreme Court of the State of Illinois. By Elliot Anthony, Esq. Philadelphia: T. & J. W. Johnson. 1855.**

With the great multiplication of Books of Reports of late years, a corresponding change in the function and use of Digests appears to have taken place. Once the latter were considered as a mere convenient adjunct to a lawyer's library, an aid to his memory, or a guide to his hand, in the search for decisions which he was supposed to know beforehand, perfectly; but never to supply the want of such knowledge. This was the view of the black-letter student, in those happy days when a wheelbarrow contained all the books of his art. But now such a stretch of supposition is impossible. Even in his own State, what lawyer can run over the hundred volumes, and tell you, page by page, subject by subject, their contents. A digest now-a-days, therefore, when well made, necessarily involves something more than a mere stringing together of reporters' head-notes, upon a thread of careless analysis. To be useful, it must be accurate and philosophic in its plan; conscientious and original in its condensation of the reported cases. These are qualities, to be sure, which resemble much those of a well ordered text book. And, indeed, the better digests now, differ but little from any other law books, except in the fact that they are not welded into one homogeneous mass, by the easy use of conjunctive and disjunctive particles. They differ from text books, only as the earthenware pot differs from china, in the glazing; and are often quite as useful.

Mr. Anthony's Digest of Illinois Reports appears to be carefully prepared, and to possess the qualifications we have specified as those upon which the merit of such a work must now depend. The points decided are clearly, and we have no doubt, accurately stated; and the analysis is highly satisfactory. It is a book which will be valuable, not only in Illinois, but elsewhere.



THE  
AMERICAN LAW REGISTER.

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MAY, 1855.  
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RIGHTS AND POWERS OF MARRIED WOMEN,  
IN PROPERTY HELD BY THEM SEPARATELY FROM THEIR HUSBANDS,  
UNDER STATUTES, TRUST DEEDS, OR OTHERWISE.

This question recently came before the Supreme Court of Rhode Island,<sup>1</sup> in a case not yet reported, under the following circumstances :

The Rhode Island statute<sup>2</sup> on this subject, provides that “the chattels real, &c., which are the property of any woman before marriage, or may become the property of any woman after marriage, shall be, and are hereby, so far secured to her sole and separate use, that the same, and the rents, profits and income thereof, shall not be liable to be attached, or in any way taken, for the debts of the husband, either before or after his death ; and upon the death of

<sup>1</sup> The question is one of general interest, inasmuch as many States have the like legislation.

<sup>2</sup> Public Laws of 1844, p. 270, secs. 1 and 2.

the husband, in the lifetime of the wife, shall be and remain her sole and separate property." \* \*

"The receipt or discharge of the husband" for the rents and profits of such property, shall be a sufficient receipt and discharge therefor, unless previous notice, in writing, shall be given by the wife to the lessee, debtor, or incorporated company, from whom such rents or profits are payable; in which case the sole and separate receipt of the wife shall alone be a sufficient "receipt and discharge therefor." \* \* And the act further provides that such property "shall not be sold, leased or conveyed by the husband, unless by deed, in which the wife shall join as grantor."

The wife held, under this statute, a leasehold estate, as tenant in common, with another party, and wanted to have it partitioned, but the proportions which each held were undefined by any deed or other document. She applied to a chancery solicitor for this purpose, and he advised a bill in equity, for the double purpose of ascertaining her title and of setting off her share, in severalty, which was held by the Supreme Court of New York<sup>1</sup> to be not only a proper, but the only mode of obtaining these objects. She retained the solicitor for this purpose, and herself promised to pay him, but did pay him only a small part of his bill for services in the long and laborious litigation which followed, the result of which was a decree defining her title, and partitioning the estate between the tenants. For the recovery of compensation for his services, he filed a bill in equity against her, together with her husband, seeking to establish a lien on her share of the property which had been the subject of litigation, stating the retainer, the services, and the importance of them to her interest in the estate, by which it was greatly increased in value, that she had repeatedly promised to pay for the services, by means of her share in the estate, and that, as he had no other remedy, it was chargeable with the payment of the amount, and praying a decree for a lien accordingly.

The defendants demurred to the bill, and it was heard in January, 1855, upon the bill and the demurrer, admitting the above statements to be true.

The plaintiff contended for the general proposition that, where a

<sup>1</sup> Green vs. Putnam, 1 Barb. S. C. 508.

service has been rendered, or expenditures have been made, at the request of a married woman, upon, or in reference to her separate estate, which were beneficial to said estate, that estate is chargeable with compensation for them,—and cited the following authorities:

*Murray vs. Barlee*, 4 Sim. R. 82, before the Vice Chancellor, who held that where a married woman, having separate property, and living apart from her husband, employed the plaintiffs as her solicitors, and promised them by letter, that she would pay their bills, but did not refer to her separate property, that that property was liable to pay the bills. This decision was confirmed on appeal to the Lord Chancellor, 3 M. & K. 209, who said, "Nothing could more effectually defeat the purposes of marriage settlements, than denying power to the wife thus to charge her estate. She is meant to be protected by the separate provisions, from all oppression and circumvention, and to be made independent of her husband, as well as all others. If she cannot obtain professional aid, and that with the facility which other parties find in obtaining it, she is not on equal terms with them. If the husband or the trustees can hold her at arm's length, and refuse her the proceeds of the fund held by them for her use, and if they can engage a solicitor, while she can only obtain such help by executing a mortgage, or by granting bonds or notes, she is not on the same footing with them," &c.

So, in *North American Coal Company vs. Dyott*, 7 Paige, 14, Chancellor Walworth held, The feme covert is, as to her separate estate, considered as a feme sole, and may, in person, or by her legally authorized agent, bind such separate estate with the payment of debts contracted for the benefit of that estate, or for her own benefit, upon the credit of the separate estate. And even the assent or concurrence of the trustee is not necessary, where no restriction upon her power is contained in the deed or instrument under which such separate estate is held, citing *Dowling vs. Maguire*, 1 Floyd & Gould's Rep. Temp. Plunkett, 19; *Cater vs. Eveleigh*, 4 Dessau. 19; *Montgomery vs. Eveleigh*, 1 McCord's Ch. Rep. 267; *N. A. Coal Co. vs. Dyott*, 7 Paige R. 9, 14, which was affirmed by the Court of Errors, in 20 Wendell, 570. And the same Chancellor reiterated the same doctrine in *Gardner vs. Gardner*, 7 Paige, 112.

The Vice Chancellor, in 1 Sandf. Ch. 25, held the same doctrine as prevailing before the revised statutes. Also, in the important case of *Curtis vs. Engell*, 2 Sandf. Ch. 287-8, the same doctrine was held. And again in *Noyes vs. Blakeman*, 3 Sandf. S. C., 531, it was held by the Superior Court that the solicitor and counsel who defended suits brought to charge the separate estate of a married woman with her insolvent husband's debts, was held entitled to recover such expenses against the estate which he had defended, on the retainer and agreement of the trustee to compensate him out of the rents and profits.

The plaintiff's counsel next cited *Jacques vs. Methodist Episcopal Church*, 17 Johns. 548, in which Ch. J. Spencer held, that the decisions fully established that a *feme covert*, with respect to her separate estate, is to be regarded in a court of equity as a *feme sole*, and may dispose of her property with the consent or concurrence of her trustee, unless she is specifically restrained by the instrument under which she acquires her separate estate; and that the established rule in equity is, that when a *feme covert*, having separate property, enters into an agreement, and sufficiently indicates her intention to affect by it her separate estate, a court of equity will apply it to the satisfaction of such an engagement.

In fine, it is said in 1 White & Tudor's Leading Cases in Equity, 370, 65 Law Library, 374, relying upon the above cited New York cases that the rule laid down in the Court of Chancery has been, that the wife's *separate estate is liable in equity for any debts, contracted by herself or her agent, for the benefit of that estate, or for her own benefit upon the credit of her separate estate*. Other important cases are quoted in 1 White & Tudor, 370 to 376, and were cited by both parties in this case. The last case cited by plaintiff was a passage from *Reid vs. Zamae*, 1 Strobb. at p. 40, which approves the decision in *Murray vs. Barlee*, above cited. He also referred to Adams' Eq. 159, 2 Stor. Eq. Jur. § 1397, and note 2, § 1400, and note 1, and § 1401.

The defendant's counsel insisted that a married woman cannot bind her separate property at all, in any case, nor can her creditors reach it, under her contracts or otherwise, except according to the

express provisions of the trust deed, statute or other instrument under which the property is held.

He cited *Jaques vs. Methodist Episcopal Church*, from 3 Johns. Ch. J. 77, which was overruled by the Court of Errors, per Spencer, Ch. J., as above. Also, *Reid vs. Zamae*, 1 Strobb, 27, which shows that the South Carolina doctrine is strong in his favor, and 1 White & Tudor, 361, 370, *et seq.* But his chief reliance was upon the R. I. statute above quoted, and the case of *Metcalf vs. Fook*, 2 Rhode Island Reports, 355, which held that where property is put in trust for the separate use of a married woman, she has no power to charge or dispose of the same except as expressly provided in the instrument creating the trust.

Judge Hale, who gave the opinion of the court in that case, said: The rights, liabilities, power and control of married women over their separate property are well established and defined in this State by positive statute and by the rules of the common law. And a *feme covert* here, is not deemed in relation to her contracts, as in some cases in England, a *feme sole*. But her right and power to bind herself or her separate property must depend in each case upon our statutes, the rules of the common law, or upon some legal instrument creating such right and power.

The court sustained the demurrer, and in concisely giving their opinion, (not written out,) said they considered the above case, decided by themselves, as substantially sustaining the defendant's ground; and furthermore, that under the R. I. statute, the husband has full control of the rents of the wife's separate property, until prohibited by the notice pointed out by it, which has not been given in this case, and, of course, the husband's power to receive the rents still remains, nor had the wife, in this case, made any appropriation of the rents nor conveyance of the property to pay for the plaintiff's services, which they acknowledged were meritorious, and they were strongly inclined to aid him, if they had the power, which they considered was denied them by the statute, under which the property was held.

NOTE.—A strong case on this subject was very recently decided by the Supreme Court of Massachusetts, sitting in Equity, *Hayes vs. Perkins, et al*, briefly reported, *infra*.

The late James Perkins, of Boston, bequeathed to his widow the clear sum of \$6,000 annually, payable quarter-yearly. She afterwards married the Rev. Dr. Doane, now Episcopal Bishop of New Jersey. This gentleman having failed in business, and being much embarrassed, a contract was made between himself, Mrs. Doane and Michael Hayes of New Jersey, by which it was agreed that Hayes should take up certain notes to a large amount, which he had endorsed for the Bishop's accommodation, and that Mrs. Doane should give him an order on her trustees in Boston to pay him \$1,000 annually for a certain number of years, until he should receive one-half of what he had advanced. Hayes proceeded to take up and pay the notes, and Mrs. Doane gave him the order requesting the trustees to pay him \$1,000 a year, as had been agreed.

The first yearly payment was made by Bishop Doane. When the second became due, Hayes demanded it of the trustees, (Thos. H. Perkins and others,) who had doubts whether they ought to pay it; and as E. N. Perkins, son of Mrs. Doane, presented an order of a subsequent date for the quarterly payment, \$1,500 then due, (which order was in favor of Bishop Doane and by him endorsed,) the trustees filed a bill in equity, asking the instructions of the court. The case was argued by C. G. Ripley for the trustees, J. L. English for E. N. Perkins, and P. W. Chandler and S. G. Wheeler for Hayes. Judge Thomas delivered the opinion of the court holding that the legacy to Mrs. Doane was intended for her support, and was to be payable quarter-yearly, and that she had no right to make such a contract as she did make with Hayes, although with the consent and for the benefit of her husband, and that the same was void in law. The order in favor of E. N. Perkins, being a quarterly payment then due, was a valid one.

The judge said (we quote from the report of the *Daily Advertiser*):

"The Court have not found it necessary to examine the question how far a *feme covert* has the power of a *feme sole* over her separate estate, because we think the contract defeats the will. It is clear that the yearly legacy of \$6,000 was devised to the devisee for the use of herself and her children during the minority; and that it was payable to her own order, subject to limitations which might arise in certain contingencies. Power to alienate by anticipation is not given by the terms of the will; and though powers may sometimes be implied for the purpose of promoting the intention of the testator, they will never be implied for defeating it. Opinion of the Court adverse to the validity of the contract."

## RECENT AMERICAN DECISIONS.

*In the Circuit Court of the United States for the Western District of Pennsylvania—Pittsburg, 1855.*

JONES ET AL vs. CINCINNATI COAL COMPANY.

THE COAL BARGES.<sup>1</sup>

Coal barges, being large, rough trunks or boxes, made merely for transporting coals, and usually sold for lumber at the end of the voyage, and not having any coasting license, are not the subject of admiralty jurisdiction.

The constitution of the United States, according to the views taken of it by the Supreme Court for the first fifty years of our Federal Government, confined the admiralty jurisdiction of the courts to tide waters; and considered that, however large were the streams on lakes, yet if the water in them was not tidal, no admiralty jurisdiction could be exercised over them.<sup>2</sup> Although, therefore, an act of 1789, which gave the court jurisdiction over enrolled and licensed vessels, spoke, in one place, indiscriminately of "waters navigable from the sea," our lakes, which had been the scene of naval victories between ships of war, and our western rivers, of late years navigated by large steamers freighted with immense cargoes, were for more than sixty years regarded as beyond any constitutional control of the admiralty. In 1845, however,<sup>3</sup> Congress taking a more extensive view of its constitutional rights, passed a law giving to the federal courts jurisdiction "in matters of contract and tort arising in, upon, or concerning steamboats and other vessels of twenty tons burden and upwards, *enrolled and licensed for the coasting trade*, and at the time employed in business of commerce and navigation between ports and places in different States and territories upon

<sup>1</sup> Extract from the MS. of S Wallace, Jr.

<sup>2</sup> *The Thomas Jefferson*, 10 Wheaton, 428; *Orleans vs. Phœbus*, 11 Peters, 175.

<sup>3</sup> Act of February 26, 1845.

*the lakes and navigable waters connecting said lakes."* This law was decided in 1851, in *The Propeller Genesee Chief vs. Fitzhugh*,<sup>1</sup> to be constitutional; and the Supreme Court, reversing its earlier decisions, as not made upon a sufficiently comprehensive view of the constitution, and of the extent, progress and necessities of the country, seemed, in that leading case, to declare that the admiralty jurisdiction granted by the constitution to the federal government, and the exercise of which Congress might allow to the courts when it pleased, extends to *all public navigable lakes and rivers where commerce is carried on.*

In this condition of the law, a coal barge, loaded with coals, and on its way from Pennsylvania into another State, was coming down the Monongahela, a considerable and important stream at Pittsburgh, Pennsylvania, but one having numerous dams and locks in it; and one which, though navigable in the rainy season, for small steamers, is perhaps hardly to be reckoned one of the great navigable rivers of the West. Coming out of a lock in the river, this barge ran foul of another barge loaded with coal, and fastened to the shore, but standing out further in the stream than she had any right to be. The descending barge was broken and sunk with her cargo, and a libel by its owner having been allowed and *sustained* by the District Court, the case came here by appeal. These western coal barges, it may be added, *are rough trunks*, being flat-boats with sides, made merely for transporting coals, and, owing to the trouble of returning up stream with them, usually sold as lumber at the end of the voyage. *They have no coasting license.*

The opinion of the Court was delivered by

GRIER, J.—The subject of dispute proposed by the libel, is a collision between two coal barges loaded with coal. They are not ships or vessels in the maritime sense of the terms. They do not take out a coasting license. They are generally mere open chests or boxes of small comparative value, which are floated by the stream and sold for lumber at the end of their voyage. A remedy *in rem*

<sup>1</sup> 12 Howard, 448.



against such a vessel, either for its contracts or its torts, would not only be worthless but ridiculous ; and the application of the maritime law to the cargo, and hands employed to navigate her, would be equally so.

The case of *The Propeller Genesee Chief*, reversing the former decisions of the Supreme Court, (which had adopted the English definition of navigable rivers, and bounded the jurisdiction of admiralty courts by tide water,) does not necessarily extend the sceptre of the admiralty over every stream whose occasional floods or factitious basins may suffice to float a steamboat. If it was unreasonable to refuse to ships and steamboats on our great lakes and rivers the benefit of the remedies afforded by courts of admiralty, it may be equally so to apply the principle and practice of the maritime law to everything that floats on a fresh-water stream. Every mode of remedy and doctrine of the maritime law affecting ships and mariners, may be justly applied to ships and steamboats, but could have no application whatever to rafts and flat-boats. A court of admiralty is not needed to try common law actions of trespass ; or administer common law remedies in any form.

The act of 1845 extends the jurisdiction of courts of admiralty to "the lakes and navigable waters *connecting said lakes*." On other navigable rivers it seems to have been assumed by virtue of the decision of the Supreme Court, and without regard to the limitations of the act of Congress, either as to place or subject. But the Court having decided this act of Congress to be constitutional and binding, it must govern the question as to the *subjects* which it defines, even if it be not considered as denying such jurisdiction on the navigable waters omitted.

This act confines the jurisdiction of admiralty courts on the lakes and rivers, to "*matters of contract and tort in, upon, or concerning steamboats and other vessels of twenty tons burden and upward, enrolled and licensed for the coasting trade, and at the time employed in business of commerce and navigation between ports and places in different States and territories upon the lakes and navigable waters connecting said lakes*."

The Supreme Court, in speaking of this provision in the act of

1845, and of the act of 1789, says—"These laws are both constitutional, and ought therefore to be carried into execution. The jurisdiction, under both laws, is confined to vessels enrolled and licensed for the coasting trade; and the act of 1845 extends only to such vessels when they are engaged in commerce between different States and territories. It does not apply to vessels engaged in the domestic commerce of a State, nor to a vessel, or boats, not enrolled and licensed for the coasting trade under the authority of Congress."<sup>1</sup>

It follows, that in order to show the jurisdiction of the District Courts of the United States in "matters of contract and tort" arising on the lakes and other navigable rivers, the libellant should aver and prove the facts and conditions stated in the act of Congress of 20th of February, 1845. In this case no amendment to this effect can be made conformably with the facts of the case.

DECREE REVERSED, and the cause dismissed for want of jurisdiction. The question of costs reserved for further hearing.

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*In the Supreme Court of Pennsylvania.*

CARRYL vs. TAYLOR.<sup>2</sup>

1. When a ship has been seized under a foreign attachment issued out of a State Court and is in the hands of the sheriff, a subsequent seizure by the marshal under an attachment for mariner's wages issued out of the District Court of the United States, can operate only as a contingent seizure, and depends for its efficacy on the event of the ship or its proceeds, or part of them, being afterwards discharged from the seizure under the process of the State Court.
2. There is no such superiority in the United States Court or in its attachment for mariners' wages, as entitles such a process to override and frustrate the previous seizure under the process of the State Court; and a sale under it while the ship remains in the custody of the State Court, or after the State Court has sold it under the foreign attachment proceeding, is void for want of jurisdiction of the subject matter.
3. In a harmonious system of government the same property may be the subject of several seizures on writs from different Courts, but all after the first seizure must

<sup>1</sup> The Propeller *Genesee vs. Fitzhugh*, 12 Howard, 458.

<sup>2</sup> This case, tried at *Nisi Prius*, will be found reported in 2 Am. Law Reg. 324, opinion of KANE, J.; also, opinion of WOODWARD, J. at p. 333.

- be subordinate to it and contingent, and can take effect only after the first seizure has been satisfied or released.
4. It is an essential rule of harmony, that, among co-ordinate jurisdictions, that one is exclusive which is first attached.
  5. Our foreign attachment is a procedure *in rem*, and a sale of chattels under it passes the title clear of all liens, and the claims of the lien holders attaches to the proceeds, which will be distributed according to the rights of all.
  6. Where chattels are sold as perishable, under a foreign attachment, the whole title is transferred, and all claimants and lien holders must come in and claim against the proceeds before distribution.
  7. Practice where property attached is claimed by a third person.
  8. Remarks upon the conflict of jurisdiction between the State Courts and those of the Union, and on the province of the Admiralty Courts.

The opinion of the Court was delivered by

LOWRIE, J.—This is an action of replevin for the ship *Royal Saxon*. The plaintiff claims title under a sheriff's sale in a foreign attachment procedure in the State Court, and the defendant under a marshal's sale, in an admiralty attachment procedure in the District Court of the United States. The two proceedings were partly contemporaneous; but the attachment of the State Court was first, and when the marshal executed his writ he returned that he had done so, and that he "found a sheriff's officer on board, claiming to have her in custody," and the case shows that the officer continued in custody up to the time when the sheriff sold her by order of the State Court.

These facts raise the question, what is the relative value of these two attachments?

It is admitted that there is no superiority of Courts of admiralty over common law Courts, that entitles their process to any pre-eminence; yet there are thoughts underlying this admission and appearing in the argument, that tend to shape and control its effect, and they need some notice.

It is no kind of evidence of their superiority that their seal is admitted everywhere in evidence; for so is that of a Notary Public. Neither in England nor here are the seals of other foreign Courts so treated; yet both there and here the admiralty is an inferior Court.

And there is no peculiarity in the principle that all the world are chargeable with notice of what is going on in the court of admiralty ; for that is only an emphatic mode of stating the ordinary doctrine of *lis pendens*.

Nor is there any peculiarity in the fact that the admiralty process against ships is *in rem* ; for almost all common law Courts have the same sort of process ; in Ohio, a justice of the peace may issue it ; and in substance, the proceeding by a justice of the peace against a stray cow is exactly equivalent. 6 Watts, 492. It is no essential part of the form that *the thing* should be styled the deft.

The District Court is not superior by reason of its being a federal Court, except so far as it has the advantage of being part of a jurisdiction which, in its highest impersonations, has the power to declare the limits of its own authority.

It has a peculiar dignity when sitting as a Prize Court, and applying the great principles of international law ; but as an Instance Court it is simply a Court of Common Pleas and Quarter Sessions, with different forms, and with jurisdiction of a special class of cases, and in the very nature of things, bound by the usages and statutes of the State where it sits, or by the statutes of the Union ; for it can have no other law. Its creation is not the institution of new relations, duties or obligations among citizens ; but merely a provision for enforcing those already existing. Where admiralty laws exist, it may administer them. Where they do not, it cannot. Like all other federal institutions, it must submit to have its jurisdiction strictly construed.

It is not superior as a Court of equity is, because of a power to draw to itself all the litigation about a particular subject matter, as being the only Court where the claims of all can be adequately adjudicated ; for it cannot even incidentally bring any other than admiralty claims within its jurisdiction.

It is merely a co-ordinate Court, and its suitors must be content to have it governed by the principle that, among equal jurisdictions that is exclusive which is first attached.

This is an essential principle of government, and presents one aspect of the idea, that all the institutions and ordinances of the same

government have a unity and consistency of purpose which demand that its functions and functionaries shall act freely and harmoniously as elements of the same system. This ideal unity does not however exist in practice in every and scarcely in any government, because of the fundamental difference in the principles that enter into the organization of its different departments. If they represent different interests, there will be conflicts between them, because their principles are various.

Hence the jealousy that once existed in England and in this country, between the courts of Chancery and Admiralty on the one hand and the common law courts on the other ; the former representing and favoring the monarchical, and the latter the democratic element of government. This jealousy has subsided or died away under the general prevalence of the popular element in the organization and control of both ; and these conflicts have resulted in advantage to the general welfare, as all such conflicts do, when they do not spread beyond the different departments of the government.

There is, practically, a similar element of discord in this country in its federal and state judiciary department, arising out of the facts that their respective jurisdictions are not susceptible of perfectly defined limits, and that the sources of their authority are not identical. And, since it is not easily seen how there can be any constituted harmony between the two forms of administration, except so far as we can rely on the wisdom and unity of the federal judiciary, it becomes very obvious that we are not without danger of having the power of the state judiciary very seriously impaired, by a process similar to that by which the local courts of the Anglo-Saxons were absorbed by the courts of the Norman kings.

This evil was, in a measure, corrected in England by the gradual infusion of the popular and customary principles into the king's courts ; but that would be no corrective here, if our American notions of the danger of any increase in the centralization of power are well founded. It is certainly a very prevalent sentiment that our state courts are competent to settle all juridical questions that depend upon state laws, and that, even if they are not, it is best that they should try to do it, and that it is conducive to general in-

telligence and order that they should be allowed to do it as best they can.

It is supposed that very much of the energy of the people of this country arises from the fact that they all participate so largely and directly in the regulation of their own government ; and it would be considered most disastrous if a majority of Americans, democratic though it might be, should govern the affairs of each state or township. Our feelings and our attention are most attracted by matters nearest home, and we can, of course, manage them better than even wiser people at a distance can do, except in those instances where our interest is too earnest for our judgement ; and if those instances be not numerous and important enough to form a class by themselves, they must take their chance of the errors and failings that belong to humanity.

Certainly there ought to be no encroachment of one department upon the province of another, founded upon the suspicion that one will do its duty less honestly or intelligently than the other. And the danger of encroachment is not avoided merely by the honesty and intelligence of those who are invested with official functions ; for these qualities are necessary to see the right and understand the defects of others in administering it, and then a strong and earnest mind may mislead them into supplying those defects by encroachments which, by reason alone of their beneficial results, become dangerous precedents of unwarranted jurisdiction.

In the true idea of the American Union there are no discordant principles between federal and state institutions, though human imperfection may lead to discordant practice. It has done so in this case, and it becomes our duty to overcome the difficulty as intelligently and discreetly as we are able.

By the seizure, under the foreign attachment of the state court, this ship was placed in the custody of the law, which means nothing less than it was in the custody of the State of Pennsylvania, by its appropriate functionaries, for all the purposes of the process then commenced against it ; and the master was garnisheed or warned to appear and defend her against the claim. Such is the law, such was the order of the writ, and such the act of the sheriff, and an

arrest in admiralty is substantially the same. Whatever might be the final result of the process, it was a necessary part of it that the ship itself should be under the control of the court, and the seizure was at least as effective as one under an execution would have been. 10 Pet. 400.

When the marshal went to execute the writ of the District Court, he found the ship in possession of the State authorities. This was a condition of affairs not provided for by his writ, and not feeling himself authorized to exclude the State officer, he simply attached the ship without interfering with the previous possession, and substantially reported the state of affairs in his return.

Let it be conceded that this was a sufficient seizure to invest the District Court with any jurisdiction over the ship that could be taken by one court over a thing that is already under the control of another; it could not entitle the marshal to exclude the sheriff. One officer is not the superior of the other, and no sort of mere private claim could justify a regulation that would allow of such a collision of functions. Different arrests on *capias* or seizures on execution could not thus interfere, even if they were from supreme and subordinate courts. Injunctions and prohibitions interfere in no such form and with no such effect. Admit that there is more inherent efficacy in an arrest of a ship for mariners' wages than there is in our foreign attachment process; still it could not operate with all its ordinary efficacy after a prior seizure under the other writ, because the prior control must remain until the prior process should be terminated, and thus far at least the mariners' arrest must be subordinate.

But is the arrest for mariners' wages more efficacious? True, it is designed to enforce an earlier lien; but that would not prevent an information in the exchequer to obtain a condemnation for a breach of the revenue laws, nor a libel in admiralty for a maritime hypothecation; and it could not prevent an absolute sale of the ship under such proceedings, even though founded on claims of inferior degree. Whether the inferior claim were in the exchequer or in admiralty, the sailors would have to follow their vessel there and make their claim. 9 Wheat. 400; 1 Rob. 178; 10 Mis. 527;

5 Blackf. 483. They could not disregard the process already commenced. Even government cannot set up her superior claim for forfeiture after the ship has been sold under an order of the court for an inferior one. 3 Price, 97.

There is no peculiar sacredness in the character of such liens that can add to their efficacy. Like many other remedies and rules of admiralty, they began in usurpation, because in disregard of the common law, and have never had any other foundation than subsequent ratification, expressed by statute or implied from submission to them. In the time of Richard II, much of this usurpation was condemned by statute, just as at other times the usurpations of the kings were condemned by *magna charta*. What was left of it and has hitherto continued to be used in England is, of course, part of their law—its subsequent general use is a ratification that pardons the vice of its origin.

So far as we have adopted, by settled custom, this part of the English law, it is a special part of our common or customary law, and it is as legitimate as any other, but not superior. How far this adoption proceeded, came very naturally to be decided in the first instance by the Admiralty Courts, unless when our several legislatures declared it. We did not, as one people, adopt it; for at the time of its adoption we were separate colonies. We did not so adopt it by creating Federal Courts of Admiralty, for they were instituted merely to enforce it, that is, where it previously existed. And so far as the several States have adopted it, they have done it only as part of their customary law, and it must of course be open to alteration by them.

We never adopt it in relation to our inland navigation, except by using its light in framing some of our statutes. The rules by which admiralty interprets the relations and duties existing between individuals, can be nothing else than the contract of the parties or the law of some place where the relation or duty is alleged to have been created, and this law must vary in different states and countries. There is no uniformity in the law of mariners' wages. In France they stand number six among privileged debts or liens, without counting salvage, which is first of all; and the privilege does not



continue beyond the completion of the next voyage, and is discharged by any judicial sale. Code de Com. 191—196. 3 Vincens Legisl. Com. 117. Pothier de Louage Mar. 55, 226—8. Our limitation of the lien would be very much the same, if the analogy of our statutes concerning liens on vessels is worth anything. Ware's Rep. 322.

If the principles which we have just expressed are not substantially correct, then certainly a channel is opened, through the province of the Admiralty Courts, by which we may enter upon the open sea of latitudinarian interpretation of federal jurisdiction, and by which many of our state institutions may be securely invaded.

We have said that this admiralty process derives no peculiar efficacy from the fact that it is *in rem*. Like other judicial proceedings, it is simply conclusive of the matters which it professes to determine. Thus it decides that a specific thing is liable to be sold for a certain debt. In this it does not substantially differ from a process to enforce a mortgage or a builder's lien, or from an action of partition, and very many other procedures. If the process served upon the defendant's property do not compel him to appear, the suit may still go on; and even herein our processes of *sci. fa.* on mortgages and judgments, and of summons in covenant on a perpetual rent, as well as our foreign and domestic attachments, are directly analagous. The peculiar style of the action is very convenient; but it is not intended or expected that the ship shall make any defence. Such suits generally proceed on the principle that there are some interests and duties to which parties ought to be prepared to attend by themselves or their agents, on a very summary kind of warning.

It is supposed that the foreign attachment, because it affected only the title of the defendant, could not affect the mariner's liens for wages. But a lien is not a title to a thing, but a right to present a claim against it and demand payment out of it; and a mariner's lien is such a right as can be asserted only by judicial process. It gives no right in the vessel until condemnation. Since, therefore, the defendant in the foreign attachment was the sole owner of it, that writ took the custody of the whole title, and then the mariners could not interfere with it, except by some direct

application to the department of government which had it in charge, or to some superior one. The law could not take it for them into custody, for it had it already for another purpose, and therefore for all purposes to which any one might claim that it ought to be applied by the State.

Were, then, the mariners' liens gone by the operation of the foreign attachment? Certainly not; for the law does not apply its remedies so as to do wrong to any one. The foreign attachment was a conditional sequestration of the ship, and it might be released from the custody of the law either by defeat of the action or by bail or by payment of the debt, just as an arrest in admiralty might be. Such contingencies attend all such seizures.

In a harmonious system of government there can, therefore, be nothing to prevent a second judicial seizure of the same property, subject to the control already taken of it in a former case, even by a different tribunal. This is the constant practice in the service of foreign attachments and executions from the same court or from different courts, and it is most completely illustrated in the case of executions issued by different justices of the peace to different constables against the same defendant. In a very recent case at Pittsburgh, *Harberson vs. McCartney*, one constable attempted, by an early sale, to get ahead of a previous levy by another, on property not easily removable, and we corrected his haste and declared the second levy subordinate to the first.

When the different processes issue from different courts, the court by whose process the property is converted into money, marshals the liens according to their legal order and distributes it, whether they are liens at large or of record. This is the constant practice in relation to the liens of carriers, factors, consignees and landlords, and all others having the same right; for the law does not use its power to their disappointment. And this principle is a mere corollary of that which attributes to all judicial sales the effect of discharging all liens, and which was demonstrated by Chief Justice Gibson, 3 Rawle. 126. And there is no matter of courtesy in this, but of mere duty, on the part of those who have to administer a system that was intended to work harmoniously.

That maritime liens and the United States Courts are a part of a more general system, does not hinder them from entering into this intended harmony—they are still part of our one system. A generous confidence and courtesy between different, even judicial functionaries, will not embarrass them in the performance of their respective duties; for certainly the forms of judicial procedure, like those of other business, are susceptible of some accommodation, and can be adapted under all circumstances to secure the end for which they are designed, and especially to the general frame of government of which they form a part. It is not at all strange for courts to exercise a very large discretion under extraordinary circumstances for the purpose of giving their process an orderly, efficient, and equitable direction. Eden's Bankr. Law, 339, 1 Mason, 409. And when access to a common superior is difficult, there is room for consultation and concession, at least as to forms.

We discover nothing that need have prevented an arrangement in this case, by which either court might have sold the ship and paid the mariners, and the surplus would have remained in, or been ordered into the other to answer the further demands against it there. It is very much to be regretted that this was not thought of by either court in the course of the cause. Since it was not done, we must now decide the rights that have arisen out of the conflicting practice.

We have said enough to show that the whole custody of the ship was in the state court, and that the mariners' liens would have been protected there, had they been presented. The next question is, were the mariners' under the necessity of presenting them in the State court, in case it should go on to the sale of the ship under the foreign attachment process?

We have already indicated our opinion that they were; but there are further reasons for it. Our foreign attachment proceeding, and also our execution attachment are as fully *in rem*, as an attachment in admiralty, with this difference,—that the former depends upon the allegation that the defendant has the title, while the latter is altogether irrespective of title, except so far as a rightful possession is necessary to a rightful use of the ship.

By our writ, the ship or other thing is taken into the custody of the law, and he who has the possession is garnished to defend all the interests which the thing represents, and his relation to the property requires that he should defend them, or give notice to the owners to look to their own interests. It is a part of the process that all claimants may intervene directly for themselves, either by a formal common law interpleader, or by an informal one. 1 Troub. and H. Prac. by Wharton, 370; 4 Rawle, 109; 2 ib. 37; 4 Binn, 61; 9 Vin. Abr. 419, title Interpleader. Brooke's Abr. same title. *McMunn vs. Carothers*, 9 Pa. Law Journal, 134.

And it seems to be really essential that this should be the effect of the process in its operation on personal property. The articles attached are often very numerous, and when sold are delivered to numerous people, and the process would do great wrong if it should leave the lien on the goods, while it is thus scattering them to the winds. If goods were thus sold, it must necessarily result in a great sacrifice of property. A lien on a ship's cargo or furniture would not be worth much after a sheriff's sale, and they would not sell for much under a threat of an admiralty attachment.

No doubt the property might be of such a character—a ship, for instance—that it might well be sold subject to a lien; but to do so would seem to require a special order. Obviously these reasons do not apply to land attached, and there is no need of adjudicating upon its title. As in the case of an inquest of office for escheat or forfeiture, the principal fact only, and not the title, is in question. Yet the possession of land is taken under the writ of attachment, and the rents sequestered into court, and the decree of the court must be conclusive as to the title to them. And such is necessarily the case when a debt is attached; for the debtor is summoned as garnishee, and the judgment may be that he pay the whole debt to the plaintiff in the attachment, and not to his creditor. If the debt shall have been previously assigned to another person before it was attached, the assignee must, on notice from the garnishee, interplead and establish his prior right, or his title will be lost. (20 Johns. 229.) The note in 4 Cowen, 520, is relevant to several aspects of this case.

But there is another view of this foreign attachment proceeding that is quite as direct and conclusive. By the execution of the writ the State takes specific chattels into its possession for certain purposes. In our practice, this purpose cannot be reached in less than about nine months, and it is very apparent that this delay may be ruinous of many articles. The interest of all concerned in them is that they should be sold, and the State exercises her best discretion when she directs this to be done. This is the means adopted to protect the interest of all who have any title to the property or claim upon it, and their rights are transferred to the proceeds. Here again, if the sale should be of many articles, as it most frequently is, and if it should be made subject to all claims except the one intended to be satisfied by the suit, it is very apparent that those claims would be most effectually destroyed by a proceeding that is pretending to protect them.

In such a case the government acts for the benefit of all, and its sale confers an absolute title. The counsel have referred to authorities enough to sustain so plain a principle: Parker's Rep. 70; Plow. 465; 1 Freem. 185; 2 Keb. 381; 12 Co. 73; 1 Vent. 313; 2 Inst. 168; 4 Johns. 34; 5 Mason, 481. We may add that the power with which the law invests the master to hypothecate or sell all interests in both ship and cargo, in a case of necessity, is another expression of the same principle. 4 Com. Bench R. 149; 7 Mees. & W. 322; 1 Exch. Rep. 537; 3 B. & Ald. 237. The effect of such a sale on the mariners' liens is very clear. They were discharged from the ship and attached to the proceeds, and those they could not possibly reach without some application to the Court that had the custody of them.

From all this it seems to follow that the arrest for the sailors depended for its efficacy upon a contingency that never happened. The proceeding in the State Court totally exhausted the subject matter of their contingent seizure, and prevented it from ever reaching the District Court. Its decree was therefore in relation to a subject over which it had no control, and was consequently void.

We may admit that a replevin suit would not prevent an attachment for a lien; because in replevin, as in ejectment, the title or

possession alone is in controversy, and the question of lien is totally independent of it. Besides, in such a suit the property is never taken into the possession of the Court, no more than a man is when he gives bail on a *capias*.

Possibly it might be said of a judgment in foreign attachment, that a sale under it, after the arrest for the sailors' wages, ought to have been made subject to them, especially if their amount were ascertained ; but it would be impossible to expect a sale for the purpose of preserving the value of the thing to take this form.

To say that the Sheriff's vendees might have intervened in the District Court, is to assume that the proceeding in the State Court had not passed the title to the thing which was in their custody, and which they had sold, and this begs the very question of the cause.

To say that the Sheriff might, in case the District Court had sold first, have applied there for the surplus, is certainly very proper, if it can possibly be admitted that the District Court could uncere- moniously take the ship out of the custody of the State Court and sell it.

It is very true that the effect which we have felt bound to attribute to the foreign attachment proceeding, may sometimes cause delays in enforcing sailors' liens ; but this cannot be avoided. There are very many other circumstances that may cause such delays. A seizure for a forfeiture or for a hypothecation may do so, and especially one for salvage. The law is neither omnipotent nor omnipresent, at least in its judicial impersonations, and it does not intend that its favors even to sailors shall apply in all cases and under all circumstances. It is sufficient that they are favored by the general rule, and, like others, they must expect disappointments in exceptional cases.

JUDGMENT AFFIRMED.<sup>1</sup>

<sup>1</sup> It is understood that this case will be taken to the Supreme Court of the United States.

*In the Supreme Court of Pennsylvania.*

BRETT vs. CHILLAS.

Articles of co-partnership having been formally executed, it is not competent for one partner to prove by parol that a consideration was to be paid by the other for making the contract, other than appears in the instrument; there being no allegation of mistake or fraud in preventing the insertion of the stipulation.

*Appeal from the Common Pleas of Philadelphia.*

A bill was filed, praying a dissolution and settlement of partnership accounts.

Upon reference to the Master, one of the charges against Brett was for the payment, out of the partnership assets, of his note for \$1000, in favor of one Mitchell. This payment was made by Chillas, who kept the accounts, and attended to the pecuniary affairs of the partnership.

Brett objected to this, alleging that it was chargeable to Chillas, under a contract by which Chillas assumed its payment; and he offered to show by one Alexander Harrison, "that at the time of the formation of the firm it was specially agreed that Chillas should assume this debt of \$1000 as a consideration for his going into the partnership—as a special consideration for the partnership. This agreement was made prior to the preparation and execution of the articles of copartnership." It was objected to as varying the written contract set forth in the articles.

These articles were by indenture, and the material parts were—

1. A stipulation for a partnership for five years.
2. That the capital should consist of \$5000 in cash, paid by Chillas, and the machinery, &c., then in use by Brett, valued at \$5000.
3. That the partners should be equally interested in profits and losses.
6. That neither should draw out more than \$700 per annum for his private use.
8. And the said Alphonse Brett doth for himself, his heirs, executors and administrators, further covenant with the said David

Chillas, his executors and administrators, that the liabilities of him, the said Alphonse Brett, are not other or greater than the several amounts scheduled in the paper hereto annexed.

In this schedule no mention was made of the note in question.

The master rejected the evidence, for the following reasons, stated in his report :

This evidence was rejected by the master at the time, and he has seen no reason subsequently to modify his decision. Notwithstanding the ingenious ground upon which the offer is based, it will be clearly seen that the effect of the testimony is to vary the solemn written articles between the partners. By the eighth article, Brett covenants that his liabilities, i. e. the liabilities of what has been called the old firm, do not exceed the scheduled amount of \$843 69. Besides this direct engagement, there is an implied covenant to meet these liabilities, as he was otherwise bound to do. The testimony offered was to show that there was another note of Brett's beyond those scheduled, which Chillas, and not Brett, covenanted to take up. This is, in fact, adding a new article to the written agreement; for the note derived its origin from the very same transactions respecting which the parties were contracting. It is impossible to separate one of these transactions from the rest and say that it formed the subject of one contract, and that the remaining transactions were the basis of another, when the motive and consideration of both contracts was the same. The mutual covenants of the articles are the mutual considerations upon which the parties have contracted.

To show that Chillas agreed that if Brett would take him into partnership upon the terms of the articles, he would take up this note, is to show that for the same covenants of Brett, that is, for the same consideration as is expressed in the articles, Chillas agreed to do more than he covenanted to do by them. This is to extend his liability beyond the written stipulations, and thus to vary them. If the offer had been made to prove facts contemporaneous with the execution of the articles themselves, and if these facts had gone to show fraud or mistake, the testimony might have been admitted; but this was not the offer as understood by the



master. The first statement was that the evidence would show that the special agreement was made "at the time of the formation of the new firm," apparently referring to an earlier date than that of the instrument, and this offer was afterwards expressly modified into proof of an agreement "prior to the preparation and execution of the articles."

In *Rearick's Executors vs. Rearick*, 3 Harris, 66-72, the last leading case on the subject, the Court say, "that in the somewhat unsteady course of decision upon this vexed point of evidence, if any principle has been adhered to with tenacity, it is that oral proof, to vary or affect a written instrument, must be confined to what occurred at the execution of it. Even thus restricted, it is acknowledged to be full of danger. To avoid, therefore, what would really be a social calamity, it is recognized as a settled maxim, that oral evidence of an agreement or understanding between parties to a deed or other written instrument, entertained before its execution, shall not be heard to vary or materially affect it." Afterwards the familiar rule is re-affirmed, that all prior negotiations and understandings are merged when a contract is once reduced to writing. As the offer was made, this case is directly in point; as is *Hill vs. Gaw*, 4 Barr, 493-495. It is also material to observe that no evidence was offered to show an omission of the alleged stipulation from the articles by fraud, or by mistake. In either of these cases equity would relieve, upon clear and undoubted proof of the fact. But these form exceptions to the general rule, which otherwise excludes parol evidence to affect a written contract, as rigidly in equity as at common law. This consideration also disposes of the case of *Campbell vs. McClenachan*, 6 S. & R. 171, cited by the counsel for Mr. Brett. There the proof was of a verbal promise at the time of the execution of the writing; and the Court say that to refuse its performance was a trick of which they would not permit the defendant to avail himself; thus distinctly putting the case upon the ground of fraud, contemporaneous with the execution of the articles. In the answer of Brett to the allegation of the bill, that his debts were \$2048 instead of \$843 69, he says that Chillas had agreed to pay him this \$1000 for coming into the concern,

and that he drew, as he was entitled to draw, on this sum as against complainant, and hence the overplus arose. The answer, so far as it is responsive to the bill, is generally evidence for the defendant; but it is nevertheless subject to the general rules respecting the relevancy and competency of testimony. The defendant cannot introduce proof by way of answer which would be rejected if offered in any other way, and his own statement of the prior contract of Chillas, though differing materially from the testimony offered before the master, is just as clearly a variation of the written articles.

The Court below confirmed the report. On the appeal, the ruling of the master on the question of evidence, was the only exception pressed.

*Guillou*, for Exception. (*H. B. Pennington* was with him.) The agreements were essentially distinct. The partnership, its terms and conditions, the relations of the parties and their relative rights, are the subject of the articles, and there is no attempt to modify or alter them. But the contract or agreement to form a partnership had no place in the articles. There is nothing there about consideration. The formation of the partnership was itself the consideration for this promise to pay. Beside, the case is within the oft repeated rule that to obtain a writing for one purpose and use it for another, is a fraud which lets in evidence to show what was the intention. 1 Spencer, 180; 5 Gil. 298; 20 Ohio, 147; 2 Har. 308; 6 Barr, 128; 7 Barr, 118; 1 Har. 49; 4 Bar. 166; 2 ib. 13; 6 S. & R. 171; 1 Jones, 238; 6 W. & S. 516; 9 Bar. 335; 3 ib. 251; 16 S. & R. 424.

*McMurtrie* contra. The only consideration pretended is the contract of partnership, and the agreement making that sets out a consideration—the mutual contracts and contributions. Whether the consideration for an executory contract forms part of it, is the real question. Whatever that was has been reduced to writing, and must speak for itself. All previous bargains on the same subject are presumably merged in the document *purporting to be a contract*. 1 Cox. 402; 2 Stark. Ev. 548–51; Best on Ev. 245; 3 Barr, 251; 7 S. & R. 60; 9 Barr, 335; 1 W. & S. 195. Fraud, mistake, or

even an intention to insert the stipulation not being pretended, the case does not come within any of the exceptions to the general rules, viz: The presumptions—1. That a written contract embodies all the bargain. 2. That all previous negotiations are merged therein. These exceptions, 1. Evidence to show that a document was made in partial execution of the contract. 2. Error in the draftsman. 3. An agreement to treat the omitted clause as if inserted. 4. Mistake in the use of words, will embrace most of the cases, if examined apart from the reasoning of the judges.

The rule, that to use a written contract for another than the intended purpose, is such a fraud as lets in evidence, is obviously a mere begging the question, how is the contract to be shown. There could be no presumption of merger of the whole contract in the writing under such a rule, and it is almost without other support than extra judicial reasoning.

If this is admitted, Chillas is made to break his covenant against drawing more than a certain sum, and Brett excused from what is otherwise an admitted breach of his covenant as to the amount of his indebtedness. *McKenna* vs. *Doughman*, 1 Penn. 417; *Collingwood* vs. *Irvin*, 3 W. 306.

The opinion of the Court was delivered by

KNOX, J.—The reasons given by the Master for excluding the testimony of Alexander Harrison, are sound and we adopt them. If received, it would have varied the terms of the written contract, and as neither fraud nor mistake was alleged, this could not be permitted.

We are disposed to adhere strictly to the rule which interdicts the admission of parol evidence, where its effect would be to establish a contract different from the one evidenced by the written statement of the parties.

The argument that the agreement on the part of Chillas to pay the Mitchell note of one thousand dollars, upon consideration that he should be admitted as a member of the firm of Brett & Co., was an independent contract, is plausible, but not satisfactory. The agreement of the parties in forming the copartnership, was an en-

tirety, and all its terms are presumed to be incorporated in the articles, signed and sealed by the parties. In the absence of fraud or mistake, this presumption is a conclusive one.

The other errors assigned were abandoned upon the argument.

Decree affirmed, and it is ordered that the appellant pay the costs which have accrued upon the appeal.

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*In the Supreme Court of Pennsylvania.*

Error to Allegheny County District Court.

PENNSYLVANIA RAILROAD COMPANY vs. M'CLOSKEY'S ADM'R.

1. The jury in estimating damages under the Act of April 15, 1851, may take into consideration the age, habits, health, and pursuits of the deceased. The measure of damages is the absolute value of the life lost, measured according to its own merits, and not according to the necessities of the kindred.
2. The principle that allows an action for death of a freeman caused by negligence discussed and re-stated.
3. The personal representatives may continue an action commenced under the statute, and recover the very damages to which deceased would have been entitled, had he survived until verdict.

The case was argued by

*Wm. A. Stokes, Esq.*, for the plaintiff in error.

Messrs. *Shaler & Stanton* for defendant in error.

The opinion of the Court was delivered by

LOWBIE, J.—William McCloskey lost his life in a collision of trains on the Pennsylvania Railroad, and his administrator brings suit for the injury, and the question which we have to consider is the measure of damages appropriate to such a case.

The learned Judge of the Court below allowed the jury to find the damages according to the value of the life lost, and suggested that, in estimating them, they might compute them by the probable accumulations of a man of such age, habits, health and pursuits as the deceased during what would probably have been his lifetime; and then added "I think this would be a fair measure of damages in this case; but if the jury can find a better rule than the one suggested, they are at liberty to adopt it."

To this it is objected that it gives to the representatives of the deceased more than compensation, that is, more damages than they

have suffered by the death ; and that thus the judgment acquires a punitive character, which, it is said, could not have been intended ; since the law has manifested its punitive will in a different form, by providing for the punishment of the really guilty persons, the servants of the company, in the Act of 1st April, 1836.

The latter part of this argument is answered by saying that there are many cases in which vindictive damages are given, though the act is also subject to punishment, and this is a denial of the unexpressed premise of the argument, and therefore the conclusion is left without support ; and we are saved the necessity of showing that it is a mere assumption to call such damages punitive. Besides this, we cannot say that a statute, providing for the punishment of "gross negligence" or "wilful misconduct," covers the very ground on which this case rests.

The main purpose of the argument, however, is to show that the representatives appointed by the law in such a case, are entitled to no more damages than they have individually sustained, and this requires a more extended consideration.

Heretofore no action has been allowed, among us, for the death of a freeman, and the novelty of the case contributes to the difficulty of determining it, and warns us to proceed with appropriate caution. But strange as the case is in our jurisprudence, we are not without analogies here and elsewhere, which may furnish us some light.

The principle that requires compensation for the death of a freeman is not at all new in history. It was long an institution among our Anglo-Saxon ancestors, and perhaps it was never positively abolished, but rather died out under the influence of the Norman conquest, and the centralizing power of the King's Courts, which treated all such wrongs as wrongs done to the King, and hence criminal offences. It seems to have been an institution common to all the Germanic nations, and perhaps to every people that rose one degree above the savage life, and were still striving to rise. With them it was intended as a compensation to surviving kindred, and as a means of preventing the disorders that follow in the train of private revenge.

There are indications of its existence among the Romans, (Dig. 9, 2, 7, 4, also 9, 2, 9, and 31,) though Pasquier (Institutes de Justinian, 4, 3,) expresses doubts about it. Voet (Pandects. 9, 2, 11,) and Pacius (Analysis Institutionum, 4, 3, 1,) refer to it as existing there and also in Holland, Netherlands, and perhaps in some other parts of modern Europe, and we have evidence of its existence in Scotland. Erskine's Inst. 592 n. 13. Bell's Principles of Law, 749; 10 Eng. L. and Eq. R, 437; as it existed among the Romans, the damages recovered by the kindred were not by way of hereditary succession; for damages for wrongs done to the body of a freeman were not allowed to pass that way. Dig. 9, 3, 5, 5; Pothier's Pand. 9, 3, 12.

A recent English statute, 9 and 10 Vict. c. 93, seems to have revived the principle of the old Saxon law, and to allow the relations of the deceased to recover damages, to be apportioned among them according to the injury resulting to them respectively. In form, therefore, the action is for their own loss, and not a survival of the right of action for the injury to the deceased. Yet the English Courts have not known how to estimate the damages, except according to the value of the life lost. 10 Eng. L. and Eq. Rep. 437; *Armsworth vs. S. E. Railway Co.*, 11 Jurist, 758; 6 Harr. Dig. 273. And this statute seems to leave other injuries to the person just as they were before, and consequently a death from another cause before compensation recovered, is not provided for.

But it is asked, how can one that is dead be compensated by a civil procedure, for injuries done to him in his life, and especially for the loss of his life? This directs us to another aspect of the present claim that is not so new as the other.

In the early stages of our law, all rights of action for wrongs done, not breaches of contract, died with the injured person. This, however, was altered by statute 4 Ed. 3, c. 7, and this alteration has been very largely extended by construction; and by our statute 24th Feb'y, 1834, § 28, nothing was excepted but slander, libel and wrongs to the person. Many of the cases thus declared to survive, involve questions of compensation and exemplary damages for wrong and insult, fraud and malice, which are to be decided upon

and executed after the injured party is beyond the reach of civil compensation, and yet the injury is measured just as if he were still living.

There are abundant indications of the same law of survivorship in the Roman law in regard to such injuries. Inst. 4, 12, 1; Dig. 44, 7, 26 and 58; Dig. 50, 17, 139 and 164; Heineccius *Elementa Juris*. ss. 1193, 1194; Pacius *Analysis Inst.* 4, 12. And these embrace a wider range of injuries than have been heretofore saved from death by our law; for they include all cases actually commenced in the lifetime of the injured party, and prevent their abatement by his death.

Our Act of 15th April, 1851<sup>1</sup>, seems to express its purpose better than the English one before referred to; for in one section, it simply provides that the action commenced for injuries to the person shall not abate by the plaintiff's death, but shall survive by substitution of his personal representatives; and in another, that if no suit for damages be brought during life by a party mortally injured by negligence or violence, then the widow, and if there be no widow, the personal representatives, may maintain an action for damages for the death.

The first of these sections is very plain, and it provides that the personal representative may continue the action commenced; that is, may proceed and recover the very damages to which the deceased would have been entitled had he survived until verdict and judgment.

The other section is somewhat less definite in regard to the damages intended; but this very indefiniteness is proof that no

<sup>1</sup> Our Act is as follows:

“That no action hereafter brought to recover damages for injuries to the person by negligence or default, shall abate by reason of the death of the plaintiff; but the personal representatives of the deceased may be substituted as plaintiff, and prosecute the suit to final judgment and satisfaction.

“That whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured during his or her life, the widow of any such deceased, or if there be no widow, the personal representatives, may maintain an action for and recover damages for the death thus occasioned.”—*P. L.*, p. 674.



other thought was in the mind of the Legislature than the wrong and damage done to the decedent; else it would have been made to appear. If one section related to damages done to the deceased, and the other to damages done to his relatives, these contrasted thoughts could hardly have failed to come out clearly in the expression.

But even if this were otherwise, we do not perceive how it could influence the damages; for they must necessarily be measured by the absolute value of the life lost, and not by the pecuniary loss which the designated representatives shall have thereby sustained. The precept involved in the law is, thou shalt not by negligence or violence take away the life of another, and the sanction of the law lies in the duty of compensation for the life destroyed, measured according to its own merits, and not according to the necessities and circumstances of his kindred. It is very hard to value: but not, for that, more uncertain than the speculations in relation to damages to kindred, which are proposed in its stead.

This thought is involved in the whole course of legislation and jurisprudence already referred to; and is a rejection of the idea that the negligence which destroys life is irresponsible, and an assertion of the principle that all negligence must answer for its results, however serious. We have not, heretofore, been startled at the absurdity of giving a pecuniary compensation for broken limbs, or ruined health, or shattered intellect, or tarnished reputation. If the body be all crushed, we have regarded its sufferings as a subject of civil compensation so long as life smoulders beneath the ruins; even though there be no capacity to appreciate or enjoy compensation. We ought not to be startled that the duty of compensation is continued when such a life is smothered out.

We call it compensation, while we admit that money is a very insufficient and uncertain measure of all such injuries. But it is the best standard we have, and in practice it is not found to be absurd. The duty of the wrong-doer to make compensation is very plain, and such as he has which the law can reach, it compels him to give; though it may never reach the consciousness of the person injured. It is an act of distributive justice in vindication of invaded



rights, and it adopts the best approximation to compensation which the authority of the law can enforce. And in these times, when criminal justice is so much out of repute, and police officers are held up to public scorn for their diligence, it is found to operate well. Call it punitive ; yet it is only indirectly so, as all compensation is, and does not wipe out any offence that it involves against the State.

From our present experience and observation, therefore, we are unable to discover any substantial error in the instructions complained of. It would be wrong to value a man's life by his probable accumulations, for most of men make none in a life-time, and many have arrived at an age when they no longer attempt to make any, and many women never make any, and yet every one is entitled to his life, and we have as yet discovered no standard for its valuation. It is not human possessions that are destroyed, but humanity itself ; and as this has no market value, it must necessarily be very much a matter of human feelings.

Hard, then, as the task may be, and however uncertain its results, it is to be performed by the jury, aided by the cautions and counsels of the judge, who has been trained in the consideration of juridical questions.

Looking, on the one hand, to the dignity of human nature as it has been assailed ; and on the other, to the position and rights of the defendant, and considering the dignity of their own position as judges of most sacred rights, and their own dignity and responsibility as individuals, and loving mercy even while doing justice, the jury must place a money value upon the life of a fellow-being, very much as they would upon his health or reputation.

The other points in this cause, we feel compelled to dispose of in a few brief propositions.

A railroad company, carrying passengers, cannot allege that a passenger is in fault in obeying specific instructions of the conductor, instead of the general directions of which he has been informed.

Assuming that a public company of carriers may contract for other exemptions from liability than those allowed by law, still

such a contract will not exempt them from liability for gross negligence.

A regulation by which a passenger with live stock on the freight train is required to remain in the cars which contain his stock, is not so transgressed, by his being on another part of the train when it is at rest, as to make him a contributor to his own injury, by that train being run into by another.

Judgment affirmed.

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*In the City Court of New York.*

THE PEOPLE vs. HERMAN RISTENBATT.

1. When a prisoner has been indicted by the Grand Jury upon evidence which appeared solely by affidavits accompanying the indictment and agreed to be read, and the facts in which were conceded to exhibit no legal evidence whatever, of the violation of a statute concerning false pretences, the Court will quash the indictment.
2. Indictment defined, and authorities for definition cited.
3. The Grand Jury is without authority to indict for want of jurisdiction of the subject matter, except upon sworn legal testimony, duly taken before a constituted authority.
4. If there is any legal proof of the offence charged, no matter how little, the Court will not quash the indictment, but will send it for trial to a petit jury.

This was a motion to quash the indictment against the prisoner for obtaining money under false pretences. The sole testimony before the grand jury consisted of certain affidavits, which failed to exhibit any legal evidence of the perpetration of the crime charged. And on this ground, the motion to quash the indictment which the Grand Inquest had found, was made.

The opinion of the Court was delivered by

STEWART, J.—The defendant is before the court upon two indictments for false pretences. Counsel for the accused moves to quash both indictments, upon the ground that they were found without any proofs of the commission of the offences preferred. On the argument of the case by Mr. Graham for the prisoner, and the District

Attorney for the people, it was conceded and agreed on the one side and on the other, that the preliminary affidavits of the complaining witnesses, which accompany the indictment, contain all the testimony given before the grand jury, and on which they acted in ordering these bills. I have read the complaining papers with care, and it is apparent that they not only fail to exhibit proof sufficient to indict, but are without any legal evidence whatever of a violation of the statute against false pretences. This being manifest, and having regard to the concession by the learned attorney for the people—that these primary depositions contain all and precisely the same facts, matters, and things testified to by the deponents when before the grand jury, and that the grand inquest had no other evidence, knowledge or information in the premises than what is expressed by the affidavits in question—it is clearly certain that the defendant has been indicted for two criminal offences, each a felony, without legal proof of their perpetration. And now upon this state of facts, (given preliminarily for a better view of the case,) the court is moved to go behind the indictments and take judicial notice of this want of proof for the purpose of setting them aside; thus raising the question, both new and important, whether a criminal court can pass behind the record to learn if there was any proof before the grand inquest going to establish the offence alleged, with a view to quash an indictment lawful in its composition, in accordance with the rules of pleading and importing absolute verity upon its face. The criminal books afford almost no authority for the exercise of such a power, and I cannot find a precedent among adjudicated criminal cases either in this country or England, for so bold an intrenchment of the heretofore scarcely disputed right of a grand jury to indict whom they pleased, when they pleased, how they pleased, and for what they pleased, with proof or no proof as they pleased, defying the Court of which they are less than a co-ordinate branch, against all views of their acts, however demanded by the rights of the citizen, or needed for ends of public justice; nor yet is there any decision involving a principle of law or rule of criminal procedure going to interdict such innovation when prudently resorted to for the attainment of truth, and the administration of

that justice which is the property of all men. An indictment as defined in *Jacob's Law Dictionary*, upon several authorities cited, is a "bill or declaration of complaint drawn up in form of law, and exhibited for some criminal offence." "It is," says Chief Justice Holt, "a plain, brief and certain narration of an offence committed by any person, and of the necessary circumstances that concur to ascertain the fact and its nature." An indictment, in the better language of Mr. Hawkins, P. C., "is an accusation made in a prescribed legal form *upon evidence*, by a number of authorized persons, of some criminal offence against the peace of the people, and when preferred in a court, becomes a record for purposes of criminal prosecution." The question recurs, may a "bill of complaint drawn up in legal form" be impeached for any cause? That it may, for some reasons, will not be disputed; and if for some, why not in all cases where it is manifest that the body indicting has no jurisdiction over the subject matter on which the accusation is predicated. If a court may look upon the face of an indictment to see if it contains all the elements necessary to its validity, why may it not go over to the persons who preferred it, to see if they were duly authorized to do so—to learn if they were constituted of the number required by the Statute, and if so, learn if they are all qualified according to law, and the like? This, it is said, is not denied. Very good. Why, then, has not the court power to inquire after any misconduct of one or more grand jurors, tending to vitiate their proceedings, or of others, going to the prejudice of their acts; or to discover whether, although a crime has been proved, it did not also appear that it was committed in a foreign State or country; or if perpetrated within the pale of their jurisdiction, whether it was not so ancient as to be without the cognizance of the criminal law; or if within, it had not been shown by the testimony of a witness infamous for crime and unpardoned of a conviction for felony: and further, of like matters? All this, I take it—certainly all except the latter instance—will not be denied by any one who has given the subject their attention. The grounds, as it seems to me, for an interference by the court in cases of this nature is, that the grand jury is wholly without authority to indict, upon the well-settled

principle that no jurisdiction, by any criminal magistracy, can obtain over the subject matter of a criminal offence, except upon sworn, legal testimony before a duly constituted authority; as no jurisdiction can be had of the body of a criminal offender, except by reason of his personal presence before the power having cognizance of the crime. If this be good law, with all the force of truth and the strength of justice, how may a grand jury indict any one of a crime, having for want of proof, no jurisdiction of the subject matter of the offence; or, if they do, why may not a court go behind the record and relieve the accused of preceding imprisonment, with the care, expense and degradation of a public trial? The answer is not that there is any law to prevent, but that it has never been done, which, with this court, would be sufficient, if justice to the citizen did not otherwise require; but when demanded by what are, in my judgment, the legal rights of the accused, it is no answer, and shall not stay this court from a prudent and careful exercise of its own sense of duty. It is, in my judgment, quite enough that a grand jury is licensed to act in secret upon *ex-parte* testimony in respect to all matters and persons, without permitting them to indict individuals contrary to the rules of law, and where no crime has been proved. *As for instance*, a witness testifies before the court and jury; a spectator hears a bystander say that the evidence is corruptly false; upon this, the spectator goes before the grand jury now in session, and swears that the witness testified to something which he believes to be utterly false, as a citizen standing hard by said it was so. And upon this an indictment is ordered for perjury. Is there no relief in such a case, save a public trial? Cannot the court, these facts appearing, quash the indictment for insufficiency of proof? If not, why not? The only answer is that there is no authoritative precedent; if not, it is time for one; for, if controlled by nothing else, grand juries should be bound by the rules of evidence, for upon this, more than anything else, depends the citizen's safety. In the case of *Dr. Dodd*, 1 Leech, C. L., 184, when the defendant was called upon to plead, he challenged the validity of the indictment upon the ground that it was found upon the testimony of incompetent witnesses. The court enter-

tained the objection. The matter was argued by some of the most able lawyers at the English bar, before the twelve judges, and it was only because they decided that the evidence was legal and the witnesses competent, that the objection failed. It is said, I know, that the doctrine expressed in this case never obtained as an authority, and does not now prevail as the law upon this subject. The contrary were quite as easily stated. In the case of *Hulbert*, 4 Denio, 133, the accused, after he had pleaded, and on going to trial, sought to give evidence relative to the character and amount of proof before the grand jury, when the indictment was found, with a view to show that but one, among a number of counts for as many misdemeanors, had been proved before the body indicting him, which was denied, as that would be to impel the grand jurors before a traverse jury, empaneled to try the accused. In the decision of this case, Judge Bronson took occasion to say that an indictment could not be impeached unless upon motion by showing that it was not found upon sufficient evidence, or that there was any other fault or irregularity in the proceeding of the grand jury, and added that, when the ends of public justice required it, a record ought to be set aside, and when done, that was an end of it. This law is controverted by the assertion that it is but the *dictum* of a judge in respect to a matter not embraced by the question under the consideration of the court—granted: it is equally the opinion of one of the ablest Judges that ever held a place in the Supreme Court of this State. An indictment is the foundation, so to speak, of a criminal prosecution, and if it is not just and lawful in all its character, it ought to be broken. Touching the two under consideration, if there was any legal proof—no matter how little—I would not combat or criticise it for the purpose of granting this motion; but as there is no lawful evidence whatever before the grand jury to negative the truth of the pretences alleged, I am without doubt of the power of the court to set them aside, and am convinced of my duty in the matter.

The motion to quash is granted.

*In the New Jersey Court of Appeals.*

THE MORRIS CANAL AND BANKING CO., APPELLANTS, AND SAMUEL F.  
FISHER, APPELLEE.

The bona fide holder of railroad bonds, having no notice of any defect in the title of the seller, has a perfect title to them, clear of all equities between the company and seller.

The Morris Canal and Banking Company, being indebted to George F. Lewis, gave him their note, payable eight months after date, and deposited with him as collateral, six of their bonds for \$500 each. When the note became due, it was not paid, and Mr. Lewis gave notice to the company that he should sell the bonds at the Exchange in Philadelphia, on a day named, and hold them accountable for any deficiency. The president of the company answered and remonstrated against the sale of the bonds, saying that they were not left to be used in that way. Mr. Lewis, however, put the bonds into the hands of the auctioneer, and they were sold pursuant to the notice, and purchased by Samuel F. Fisher. There was no notice given at the sale, of any defect in Mr. Lewis' title, nor did it appear that Mr. Fisher had any knowledge of the transactions between Lewis and the company.

The company having refused to pay the interest coupons, and the trustees named in the mortgage given to secure the payment of the bonds and interest, having declined to institute proceedings to enforce the payment, Mr. Fisher filed his bill in the Court of Chancery of New Jersey for a foreclosure and sale or sequestration of the canal, its income and tolls. The case having been brought to a hearing in that Court, was referred to a master by the Chancellor, he having been of counsel in the case, before his appointment. The Master reported his opinion to be in favor of the complainant, and a decree was accordingly made, that the company pay the interest due, with costs, and that in default thereof, their revenue, tolls, issues, profits and dividends be sequestered, etc. From this decree the company appealed, and the case was argued before the Court of Appeals, at November term, 1854, and held under advisement until



March term, 1855, when the decree was unanimously affirmed, and the following opinion of the Court was delivered by

ELMER, J.—The complainant, Samuel F. Fisher, was shown to be the bona fide holder of six bonds of the Morris Canal and Banking Company, the defendants below, and the question upon which the case on this appeal mainly turns, is whether the honest acquisition of these securities, without notice of any defect in the title of the seller, if a defect there was, confers on him a title, similar to that acquired by a bona fide holder of money, bills of exchange and promissory notes, payable to bearer. So far as we are aware, this is a case of the first impression, and it is certainly one of no little importance. Similar bonds have been issued, within a few years, by our numerous railroad and canal companies, to an immense amount, and are daily sold by brokers and others, and passed from hand to hand by delivery, without any formal assignment, and without inquiry as to the title of the possessor.

The case has been elaborately and ably argued on both sides. On behalf of the appellants, it was insisted that these bonds, being under seal, are in law specialties, and although in terms payable to bearer, if they are assignable by delivery only, it is by force of our statute, which leaves them subject, in the hands of the assignee, to all the equities, to which they were liable in the hands of the assignor. *Rev. Stat.* 801. That such is the law in the case of ordinary bonds, cannot be questioned. By the common law, such bonds cannot be assigned, so as to give a right of action to the assignee, although payable in terms to an assignee or bearer. *Glyn vs. Baker*, 13 East, 509; *Clark vs. Farmers' Man. Co.* 15 Wend., 256. Our statute, however, authorizes an assignment, whether a bond is, or is not, payable in terms to an assignee. *Sheppard vs. Stites*, 2 Hal. 90. And such assignment, it has been held, may be by delivery for a valuable consideration, without any writing. *Allen vs. Pancoast*, Spen. R. 68. The mere insertion, therefore, of words, making these bonds payable on their face to a bearer, is by no means decisive of the question now in dispute. Nor do we think it would necessarily follow, that they would be subject to whatever equitable defence might be made against them in the hands of the assignor,



if they were not legally assignable, so that the assignee could sue on them in his own name. Smith, in his note to the case of *Miller vs. Race*, Smith, L. C. 363, seems to consider that such would be the result; and no doubt the ability of the holder to sue in his own name, is essential to render an instrument negotiable, in the full sense of that expression. But Courts of Equity and Courts of Law protect the interest of a bona fide assignee. If, however, the assignee takes no legal, but only an equitable title, they protect, also, the equities existing at the time of the assignment, between the maker of the instrument and the assignor. If the bonds in question are transferable by delivery, so as to confer a complete title in the possessor, it is not as instruments negotiable under the law of merchants, as bills and notes are, but as instruments of a peculiar character, expressly designed to be passed from hand to hand, and by a common usage known to all, actually so transferred. That they are on their face payable to bearer, is of course an important and, perhaps, indispensable circumstance, to show that this was in fact the design, and that they are so used. But the usage itself, and in a case like this, where the party issuing them is before the Court denying the holder's title, the manner in which they were issued and used by the company itself, are the important facts which must have the principal influence in determining their true character.

If in point of fact, they are of such a character that a full title was intended to be conferred on any person who became the bona fide possessor of them, and this intention was not in contravention of the law, the original maker has no equity against the assignee. By the act of issuing a security, which, although in some respects like an ordinary bond, was in its main characteristic of being designed to pass freely from hand to hand, and of being so held out to the world, essentially different, all such equities were designedly relinquished, and ought not to be regarded by courts of law or of equity.

That under ordinary circumstances, the property of bank notes and of bills and promissory notes payable on their face, or by a blank endorsement, to a bearer, follows the possession, has been long settled. By analogy to this class of cases, the exigencies of busi-

ness have from time to time introduced other securities into the same category. The Court of King's Bench seems to have hesitated to recognize India bonds as belonging to it, *Glyn vs. Baker*; but Parliament immediately interfered and declared them negotiable instruments. Exchequer bills were so regarded in the case of *Wookey vs. Pole*, 4 Barn. & Ald. 1. In the case of *Gorgier vs. Mievill*, 3 Barn. & Cres. 45, bonds of the King of Prussia, which were shown to be ordinarily passed from hand to hand by delivery, and so designed, were held to be like money or bills, so as to give a bona fide possessor the legal title. And in the case of *Lang vs. Smith*, 7 Bing. 284, the same principle was applied to the case of instruments issued by the government of Naples, although in that case they were held not to be negotiable, because it was found that they did not usually circulate, without a certificate, which did not accompany them. Parsons in his recent work on Contracts, vol. 1 p. 240, expresses the opinion that the common bonds of railroads, fall within the reasoning and authority of these cases.

The manner in which these bonds are engraved, with coupons making the interest payable half yearly to the bearer of them, and all the evidence before us conspire to show that the company which issued them, and which now disputes the title of the holder, upon the ground that they put them into the hands of the seller for a special purpose, which did not authorize him to dispose of them as he did, really intended them to circulate, as in fact they do. This design is indeed quite as apparent as if it was engraved on their face in express words. The objection now made, that the legal character of the instrument adopted is such as to frustrate this design, certainly comes with a bad grace from the party which put them in circulation. Even as between third parties, we suppose the common usage to transfer them by delivery, without inquiry as to the title of the transferee, would justify us in holding these securities to differ from common obligations, in being so far negotiable that the bona fide possessor shall be held to have a good title. But the case is still stronger against the party which made and issued them, with full knowledge of the prevailing usage, and with the manifest design that they should be so circulated. To permit

such parties to dispute this result of the usage, would be to permit them to take advantage of their own wrong. And besides, the obvious interest of the companies is, that these bonds should be saleable, free from all questions of equity. They are generally issued for the express purpose of raising money by their sale. To declare them subject to the equities existing in the case of ordinary bonds, upon every transfer of them, would be to strike a blow at the credit of the great mass of these securities now in the market, the consequences of which it would be impossible to predict.

We are therefore of opinion that the title of the present possessor of these bonds must be held to be complete. His right to proceed on the mortgage, in the manner adopted, follows as a necessary consequence. As to the objections that the bonds were not issued for any purposes authorized by the stockholders and directors, and that they are illegal, fraudulent and void, and that the bill of complaint is not properly drawn, it is only necessary to express our concurrence in the conclusions to which the master came, and in the reasoning upon which he founded them.

This view of the case renders it unnecessary to enter at large upon the investigation of the question so fully discussed by counsel, whether Mr. Lewis had a right to sell the bonds as he did. Some of the views taken by the master, in his very able opinion on this subject, seem questionable. If the bonds in dispute ought to be considered as placed in Lewis' hands by way of pledge, it is probably because they were securities usually sold in the stock market, and understood by the parties to be designed for that use; and not because a party's ordinary bond or mortgage deposited as a collateral, could be so regarded. No case was produced where the debtor's own obligation has been held to be a pledge for a debt due by simple contract. Nor do we think it clear that even a third party's bond or mortgage, deposited by way of a collateral or a pledge, can be sold by the pledgee, in default of payment, after notice to the pledger, unless a known usage or express agreement to do so is shown. But it is not intended to express any decided opinion on these points. For the reasons assigned, the decree appealed from must be affirmed, each party to pay their own costs.

*In the Supreme Court of Georgia.*

FRANCIS LENNARD vs. THOMAS BOYNTON.

One to whom a slave is hired for a year, is entitled to no abatement of the price because of the death of the slave after the commencement of the term.

Assumpsit, &c. in Talbot Superior Court. Decision by Judge Irverson, September Term, 1851.

Thomas Boynton brought suit against Francis Lennard, on a note for \$100, given for the hire of a negro, for the year 1850, and payable to Rebecca Boynton, or bearer.

Francis Lennard pleaded that the negro died on the 1st May, 1850, and that the note was transferred to Lennard on 1st February, 1851, after it was due, and with notice of this defence.

On motion, the Court below struck out this plea, and this decision is assigned as error.

The opinion of the Court was delivered by

LUMPKIN, J.—The only question in this case is, whether when a negro is hired for a year, and he dies within the time, the hirer should be allowed a credit upon his note, from the time of the negro's death to the end of the year, for so much as the hire for that time would amount to?

In Scotland, France, Canada, Louisiana, and indeed all those countries where the Civil Law obtains, it is probable that the hire would be apportioned. In South Carolina, where the Common Law has never been adopted throughout, as the basis of their jurisprudence, the same doctrine obtains, and the Courts of that State apply the same principle to real estate. *Ripley vs. Wightman*, 4 McCord, 447.

In Virginia, it has been held, that if a slave who is hired for a year, be *sick* or *run away*, the *tenant* must nevertheless pay the hire; but if the slave *die* without any fault in the tenant, the *owner*, and not the *tenant*, should lose the hire from the death of the slave, unless otherwise agreed upon. *Guage vs. Eliot*, 2 Hen. & Munf. 5.

The reason given by Chancellor Taylor is, that in pursuing this rule, the act of God falls upon the *owner*, on whom it must have fallen if the slave had not been hired. *Non constat!*

And the Court of Appeals of South Carolina, seem to consider this decision and the previous ruling of their own, in *Ripley vs. Wightman*, that if a man lease a house for a year, and during the time it is rendered untenable by a storm, the rent ought to be apportioned according to the time it was occupied, as decisive of the question, that where a slave hired for a year, and dies within the year, his wages should be apportioned. *Bacol vs. Panell*, 2 Bailey, 424.

The Supreme Court of Missouri had occasion to consider this point in *Dudgeon vs. Teap*, 9 Missouri 867, and while they adhere to the decision of Chancellor Taylor, and which seems to be the authority for all the subsequent adjudications upon this subject, they state distinctly, that if the analogies of the law on the subject of *rents* be adhered to with strictness, that this doctrine cannot be sustained. And so we think.

If natural justice requires that rent ought to be abated or apportioned, because the thing to be enjoyed be entirely lost or taken away from the tenant, it would be unreasonable to allow the owner hire for a "*dead negro*."

But we apprehend the principle to be now well settled that where the lessee covenants to pay rent, he is bound to pay it, whatever injury may happen to the demised premises; and that if the tenant would guard himself against loss by fire and tempest, he must introduce into his lease an exception to this effect *Paradine vs. Jayne*, Aleyn, 27, cited per Lord Ellenborough, C. J. 10 East, 531; *Argument in Brecknose Company vs. Pritchard*, 6 T. R. 751, recognized per Lord Kenyon C. J. ib. 752; Wood. L. & T. 5th ed. 471, 518. *Belfleur vs. Weston*, 1 Term Rep, 312; *Monk vs. Cooper*, 2 Lord Raymond, 1477; *Carter vs. Cunnius*, 1 Ch. Cases 83, 2 Vernon, 280; 1 Fonbl. Eq. 378, 379, and the authorities there cited.

This is no longer an open question with this Court, as to *real estate*. In the well considered case of *Whites vs. Mollyneux*. 3 Kelly's R. 124 we held upon a full review of all the authorities, that in case of express contracts to pay rent, the destruction of the premises by fire or violence, or any casualty whatever, is not a good

defence to an action to recover the rent unless there is an express stipulation to that effect; and that a Court of Equity could not relieve against such circumstances.

With that opinion, supported as it is by an overwhelming weight of authority, we have no reasons to be dissatisfied. Independent of precedents, and if this were a case of the first impression, why I ask, should not a party who, by his contract, created a duty or charge upon himself, be bound to make it good, notwithstanding any accident by inevitable necessity?

But it is said that it would be unreasonable that these things which are inevitable by the act of God, which no industry can avoid, nor any policy prevent, should be construed to the prejudice of any person in whom there is no laches. I. Rep. 97. And the maxim of the Common Law, *Actus Dei nemini facit injuriam*, is invoked in aid of the defence set up to the recovery of the hire.

How far this principle was justifiable in adjudging emblements to those who had an uncertain interest in lands, which was determined between the period of sowing and the severance of the crop, I will not undertake to say. That the rule, like many others respecting real estate, was introduced to favor the landed aristocracy of England, by encouraging husbandry and preventing the ground from remaining uncultivated is obvious enough.

But where it is assumed as the ground for a legal judgment, that the dispensation of Providence shall prejudice no one who is guilty of no default on his part, I beg leave to demur to the proposition. Not to adduce innumerable other illustrations I refer to one only, which is directly in point. Negroes were hired at the beginning of last year, owing to the high price of cotton and other produce, at the most extravagant rates, throughout the State. Owing to the unparalleled drought in the middle counties, the failure in the crops was almost entire. Is not this, *actus Dei*, in withholding the early and the latter rain? No laches is attributable to the hirer. If the death of the negro would entitle him to relief, why should not this other providential visitation? In our judgment, neither should. He hired the slave *unconditionally*. He must comply with his engagement.

The one view of this matter is simple and intelligible; it is neither more nor less, than the condition of the party to fulfil his contract. The other is vague and fluctuating, because it rests on no solid foundation. For I speak with reverence, when I say that the acts of God, by hail, drought, inundation, pestilence, tornado, and the ten thousand judgments, public and private, by which he afflicts for their good, the children of men, prevent the fulfilment of more contracts, than all human misconduct put together.

Suppose it were otherwise, why should the loss fall exclusively upon the owner of the reversion or fee? Is it not enough that he is deprived of his property? And is not the hirer the *quasi* owner for the time being? Does he not take the risks for the year, unless he stipulates against them? Does he pay the premium by way of addition to the price of hire, for life insurance? If not, why give him virtually the benefit of such a policy? Why tax the owner with it, when he is paid for it? He agrees to take the value of the servant's labor merely; and if he is to be considered as having insured his life, he should be compensated for the risk.

The uncertainty of the negro's life was equally well known to both Boynton and Lennard, when the contract for the hire was entered into between themselves. What power has any Court to modify or change their contract? When the slave was delivered, the contract was executed by the owner. His part was performed. Lennard expressly stipulated to pay the hire; and however hard it may be upon him to pay wages for services which cannot be rendered, let it be kept in mind that he brought his hardship upon himself. It was his own voluntary act, and he has no claims upon the justice of the Courts to be relieved.

Apart from the principles involved, motives of public policy forbid a rescission of this contract. Humanity to this dependent and subordinate class of our population requires, that we should remove from their hirer or temporary owner, all temptation to neglect them in sickness, or to expose them to situations of unusual peril and jeopardy. We say to them, go, and they must go; stay, and they must stay; whether it be on railroads, the mines, the infected districts or anywhere else. Let us not increase their danger, by



making it the interest of the hirer to get rid of his contract, when it proves to be unprofitable. Every safeguard, consistent with the stability of the institution of slavery, should be thrown around the lives of these people. For myself, I verily believe, that the best security for the permanence of slavery, is adequate and ample protection to the slave at our hands.

Slavery not being tolerated in England, no case precisely in point could be found in the Reports of that country. In our judgment the case of rent for demised premises and that of the hire of negroes, is not only strikingly, but strictly analogous. One is compensation for the use of houses and lands, the other for slaves. And if the Courts will not relieve the tenant from the payment of rent, when the demised premises is destroyed by casualty, and we have held that they could not, still more emphatically does policy at least, if not principle, forbid relief against the hire of a negro who has died before the expiration of the term. We have great respect for the distinguished Chancellor of Virginia, who decided differently, and for the able tribunals in our sister States, who have subscribed to the doctrine thus established. Entertaining a contrary view of this question, both upon principle and policy, we cannot interfere to discharge Mr. Lennard from his undertaking fairly and freely made, however hard it may appear.

The Judgment of the Circuit Court must be affirmed.

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*In the Superior Court of Cincinnati—December, 1854.*

JAMES WILSON & CO. vs. BAILEY & SON.<sup>1</sup>

1. A receipt containing an agreement, stipulation, or condition between the parties, is in the nature of a contract.
2. Parties who appear on the face of a contract, to be the *only* parties bound, cannot introduce parol proof to show that they are not the parties bound, but the third persons are in reality the contracting parties.

<sup>1</sup> We are indebted to the Reporters, Messrs. Handy, for the early sheets of their 1st volume, where this case will be found, at p. 177.



3. It is admissible, to show that the act of the party signing the contract, is also the act of his principal, so as to render the latter *also* liable.
4. Where the defendant answers that he executed the contract upon which he is sued, as a broker or agent, and after the testimony is before the Court, claims to amend his answer so as to show he executed the contract under a mistake of his legal responsibility thereon, the Court will not grant leave to amend unless the facts proved, show at least a reasonable probability that this can be established.

This is an action to recover the balance of an advance made on one hundred barrels of linseed oil, sold by plaintiffs as commission merchants, for and on account of the defendants. The plaintiffs have offered as evidence of their contract, in respect to the advance, and the sale, an instrument, of which the following is a copy:

“Received, Cincinnati, February 16th, 1854, of James Wilson & Co., Twenty-six hundred and seventy-five,  $\frac{05}{100}$  dollars, as an advance on one hundred barrels linseed oil, in their store; for which advance we agree to pay them interest at the rate of six per cent. per annum; a commission of two and a half per cent. on sales; storage (5) cents per barrel per month, and insurance (to be held no longer than sixty days).  
M. BAILEY & SON.”

The first defence set up by the defendants is, that they are not personally liable; that they acted as brokers for other parties; and that this was known to plaintiffs. Upon this, the first inquiry is, whether the instrument recited above is a contract? And secondly, if it is, whether its effect can be changed, as proposed by the defendants?

The opinion of the Court was delivered by

GHOLSON, J.—As to the first question, it can scarcely be claimed that the writing does not constitute a contract. The distinction is well settled between a mere receipt, acknowledging money paid, and a receipt containing an agreement, condition, or stipulation, between the parties. The latter is in the nature of a contract. *Niles vs. Culver*, 8 Barb. 205; *Goodyear vs. Ogden*, 4 Hill, 104.

Upon the principle of these cases, the writing must be deemed a

contract. But in truth, the present may be considered a much stronger case. The expression, "as an advance," would seem to be sufficient to create an obligation to return the money; or, that it should be returned, under the terms, or in the mode stipulated.

The instrument of writing being a contract, the next question is, whether the defendants can be permitted to show by parol proof, that they, though apparently the only parties bound, are not liable, but that third persons, whose names do not appear on the face of the instrument, were, in reality, the contracting parties? And this, I am satisfied, cannot be done. The law on this point, as collected from several recent authorities, appears to be plainly opposed to the introduction of parol proof for such a purpose.

Parol testimony is inadmissible for the purpose of introducing a new party, but not for that of discharging an apparent party to the contract; where it shows, not that those whom the contract purports to bind, are not bound, but that another is bound, by reason that the act of the agent in signing the agreement, is also the act of the principal. Evidence to show that the party apparently bound, as personally contracting, is not so bound, would be to contradict the written agreement. *Kean vs. Davis*, 1 Spencer, 425-429; 2 Smith's Lead. Cases, 224; Story on Agency, §270; *Higgins vs. Senior*, 8 M. & W. 834; *Magee vs. Atkinson*, 2 M. & W. 440; *Pentz vs. Stanton*, 10 Wend. 271-276; *Stackpole vs. Arnold*, 11 Mass. 27.

"The true principle appears to be, that parol testimony is not admissible, for the purpose of exonerating an agent who has entered into a written contract, in which he appears as principal, even though he should propose to show, if allowed, that he mentioned his principal." 1 Spencer, 429; 8 Mees. & Welsb. 834; 33 E. C. L. 122.

"If an agent contracts in such a form, as to make himself personally responsible, he cannot afterwards, whether his principal were or were not known at the time of the contract, relieve himself

from that responsibility." Denman, C. J., 6 A. & E. 486; 33 E. C. L. 122.

The chief difficulty which has occurred in this class of cases, has been one of construction; whether, on the face of the instrument, the party acts as a principal, or as an agent? That difficulty does not arise in this case; for the contract here clearly on its face binds the defendants.

In this view of the law, as the issue now stands between the parties, it is not necessary that I should endeavor to reconcile the contradictory evidence which has been given. It is claimed, however; by the counsel for the defendants, that they are entitled to such an amendment of their answer, as may enable them to show that the contract was executed under a mistake, or through some misapprehension as to their legal responsibility.

To make out such a defence would require very clear proof; and I should not be justified in permitting the amendment, unless satisfied, from the facts proved in the case, that there was at least a reasonable probability of its being established. As to any material facts, showing a mistake in the execution of the contract, or that it was even signed under a misapprehension, there is, to say the least, no preponderance of testimony on the part of the defendants; much less, that clear and convincing showing, which I understand the rules of law in such a case to require. Nor, indeed, am I satisfied that the character of the mistake, under which the defendants, who signed the contract, acted, is of that kind to authorize the relief asked. In any view, I do not think a proper discretion requires of me to permit an amendment.

The issue in the case will be found for plaintiffs.

*Haines, Todd and Lytle*, for plaintiffs.

*Caldwell and Burrows*, for defendants.

## LEGAL MISCELLANY.

## HINTS TOWARDS A HISTORY OF THE SUPREME COURT.

*To the Editors of the Law Register:*

GENTLEMEN :—Will you permit me to suggest some hints towards *a history of the Supreme Court of Pennsylvania?* If the subject were pursued by a competent hand, it could not fail to be a valuable contribution, not only to the literature of the profession of the law, but practically useful in the administration of justice. There is one individual at least among us, who, if he could be prevailed on to undertake it, would do ample justice to such a theme, and who, having long ago retired from the more active duties of his profession, after having secured a most enviable reputation, has leisure to put into form the results of his experience, learning and reflections on this important subject. This brief article is only intended to suggest an outline of such a work, through the hope that such a one as the person referred to, may be induced to fill it up, or propose and fill up a better.

The history of a court of justice, written with care and fidelity, would be as curious and interesting as that of many a State or hero ; certainly of greater importance, and of more practical utility to the profession, and community over which it exercises jurisdiction. A good judge is one of the greatest blessings that a people can possess : and he is especially such to the profession from which he himself has sprung, and with whose honor and character his own are intimately connected. The efficiency of the laws of the land in attaining the end of their creation, must always mainly depend on the character of the Bench, and of the individuals of which it is composed. It is not the rights and interests of litigants only, that are dependent on the integrity, judgment and ability of judicial functionaries ; but the temporal well-being and happiness of the community : and the cause of justice and morality are also intimately bound up and connected with these. On the other hand, a judge or bench destitute of integrity, of learning, of dignity, of

independence and ability, or liable to be swayed by passion, prejudice or corruption, "fear, favor or affection," is one of the greatest evils to which a community can be exposed, and one of the most mischievous and dangerous instruments of wrong, injustice and oppression, that can inflict any people.

In the history of the Supreme Court of Pennsylvania, deduced from its origin to the present time, are to be found many illustrious examples of the former class, and perhaps as few instances of the latter as falls to the lot of most States and nations.

The history of this Court might be conveniently divided thus :

1st. History of the Court prior to the year 1777.

2d. During the period when Thomas M'Kean presided as Chief Justice, 1777 to 1799.

3d. During the period that Edward Shippen was Chief Justice, 1799 to 1806.

4th. During the Chief Justiceship of William Tilghman, 1806 to 1827.

5th. During the time that John B. Gibson was Chief Justice, 1827 to 1851.

6th. History of the Court since the judges have been elected by the people, 1851 to the present time.

Numerous topics would be involved in the investigation of the history of each of these periods. Among them, a few may be suggested: 1. *The judicial character of each Chief Justice and his associates, as derived from his decisions, &c.* This title would embrace several matters, such as the experience and practice of each judge at the bar, before taking a seat on the bench; his qualifications for the office, in reference to professional acquirements, such as law learning, business talents, temper, soundness of judgment, or the reverse, as exhibited in his decisions and opinions; whether the rule of *stare decisis* was respected by him, or whether he was tempted to yield to the seductive solicitations of the "fiend discretion," as Sir William Jones designates that most fatal enemy of law and jurisprudence: a vice to which every tribunal is naturally prone, and which, if unchecked and unrestrained, takes away all certainty and stability in the administration of justice, and threat-

ens the safety of all the dearest rights of individuals. The rule of *stare decisis* is one of the most effectual antidotes to the poison of this vice, the best counter-charm to the incantations of the fiend.

2. Another topic involved in the history of each of these periods would be, the effects produced on the *laws by the administration of each successive series of judges*: as, whether any of the doctrines and principles of the law had been changed, modified, abrogated or restored; and whether the application of these, and their practical working and operation had been altered, restrained or extended; and whether these changes had become engrafted permanently on the jurisprudence of the State, or their influence had been but partial and transitory. This would lead to the subject of judicial legislation, a topic to be handled with delicacy and discrimination, but candidly and without timidity, or the servile fear of names or of men.

3. Another subject to which the judicial historian would direct his attention, would be *the mode of dispatching and transacting the business of the Court during the several epochs of its history*. This would involve the mode of preparing cases for argument—the rules as to the hearing of counsel—the demeanor of counsel and judges respectively, in their intercourse with each other—the consultations of the judges on the bench and in their private meetings. The ethics of the bench would form an important feature of this department. Judge Sharswood has rendered good service to the bar by his “Professional Ethics.” He would serve both bench and bar by giving his views on “Judicial Ethics,” or Ethics of the Bench. Under this head might also be discussed the subject of the causes which have led to the abridgment of the right of counsel to be heard, and whether the practical working of this rule tends to the better administration of justice.

These are a few of the inquiries to be made by one who would undertake to write a History of the Supreme Court of Pennsylvania. I do not know any literary or professional work calculated to benefit the bench and bar of Pennsylvania more than such a history faithfully executed. Let me invite you to urge the task on one competent to perform it, one whose learning, judgment, abilities

and leisure require him to pay, in this currency, the debt he owes his profession, and the amount of which debt is greater in proportion to the extent of the talents bestowed upon him.

Permit me to subscribe myself your friend, and also

AMICUS CURIÆ.

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## PRESUMPTION OF SURVIVORSHIP.

In a very late English case, 1 Jur. N. S. 169 Ch., *Underwood vs. Wing*, where it appeared that both husband and wife were drowned at sea, having been swept off the side of the vessel by the same wave, there was no direct evidence, one way or the other, as to survivorship, but there was considerable medical evidence of a conflicting nature. Some of the medical witnesses stated that asphyxia would take place at the same time in a case of complete and continued submersion of a man aged forty-three and of a woman aged forty, (the respective ages of the husband and wife), and that there was in this case no medical presumption of survivorship. Others of the medical witnesses stated, that although asphyxia might take place at the same moment of time in both cases, still that asphyxia was not death; and that "the length of time between asphyxia supervening and death ensuing, would depend on the physical strength of the party, varying according to age and sex, and the healthy or unhealthy state of the body; *cæteris paribus*, that time would be longer in the case of a male of forty-three, than of a female aged forty;" and they were of opinion that there was in this case a *medical* presumption in favor of survivorship of the husband.

But held by WIGHTMAN, J.—The question of survivorship is the subject of evidence to be produced before the tribunal which is to decide upon it, and which is to determine it as it determines any other question of fact. If there be satisfactory evidence to show that the one survived the other, the tribunal ought so to decide; and if there be no evidence, the case is the same as in a great variety of other cases, more frequent formerly than at present, where

no evidence exists, and consequently no judgment can be formed. On this point we concur with the Master of the Rolls. We think there is no evidence to show whether the husband or the wife was the survivor. There may be surmise, and speculation, and guess; but we think there is no evidence. We have no doubt that the scientific gentlemen who were examined, were perfectly sincere in their opinions; but it is obvious that their evidence was given having reference to the case of two persons quietly submerged in water, and remaining there until drowned, or to the case of two persons, one being a swimmer, the other not, and both thrown suddenly into the water unincumbered, and acting on certain instinct. The present case is that of two persons clasped together, two boys clinging to one of them, standing pretty high out of the water, on the ship's side, swept off together by an overwhelming wave into a raging sea; and one or other or both of them may have been stunned by the violence of the blow from a wave, or they may have struck against a timber of the ship, and may, in fact, have been dead before he or she reached the water at all. How is it possible, under such circumstances, for any tribunal sitting judicially, to say which of these two individuals died first? We may guess, or imagine, or fancy; but the law of England requires evidence; and we are of opinion that there is no evidence upon which we can give a judicial opinion that either survived the other.

In this opinion the *Lord Chancellor* fully concurred.

Mr. Best, in his *Princ. of Evid.*, p. 478, 2d ed., had arrived at the same conclusion, although his book does not appear to have been referred to by either counsel or Court. We subjoin the passage: "As connected with the subject of the continuance of human life, it remains to notice a class of cases which have embarrassed, more or less, the jurists and lawyers of every country. We allude to those unfortunate cases which have from time to time presented themselves, where several individuals, generally of the same family, have perished by a common calamity, such as shipwreck, earthquake, conflagration, or battle, and where most usually the priority in point of time of the death of one over the rest, would exercise an influence on the rights of third parties. The civil law



and its commentators were considerably occupied with questions of this nature, and it seems to have been a general principle among them, (subject, however, to exceptions,) that where the parties thus perishing together were parent and child, the latter, if under the age of puberty, was presumed to have died first; but if above that age, the rule was reversed. In the case of husband and wife, the presumption seems to have been in favor of the survivorship of the husband. The French authors, also, both ancient and modern, have taken much pains on this subject. All the theories that have been formed respecting it are based on the assumption that the party deemed to have survived was likely, from superior strength, to have struggled longer against death than his companion. Now, even assuming that *prima facie* a male would struggle longer against death than a female, a person of mature age than one under that of puberty, or very far advanced in years, the position can at best only hold good as a general rule; for not only in particular instances might the superior strength or health of the party supposed to be the weaker reverse all, but the rules rest upon the hypothesis that both parties were in exactly the same situation with respect to the impending danger—a circumstance, generally speaking, unascertainable in the fury of a battle, or the horrors of an earthquake or shipwreck. Add to this, that, according to some modern physiologists, in certain species of deaths the strongest perish first.<sup>1</sup>

“However this may be, in opening the door to this class of questions, the lawyers of Rome and France lost sight of this salutary maxim, ‘*Nimia subtilitas in jure reprobatur.*’ The English law has

<sup>1</sup> “See Beck’s *Juris*. 897, 7th ed., where is related an incident furnished by a modern traveler, who, in giving an account of a caravan coming in want of water in a Nubian desert, says that “the youngest slaves bore the thirst better than the rest; and that while the grown-up boys all died, the children reached Egypt in safety.” The same author adds, ‘As to habit and variety of constitution, all such as have a tendency to affections of the head and lungs should be deemed the first victims, in case the causes of death are of a description to affect these. And the moral condition must not be overlooked: the brave survive the fearful and the nervous.’ We subjoin the following statement, though not from a work of authority:—‘It seems that death from hunger occurs sooner in the young and robust, their vital organs being accustomed to greater action than those of persons past the adult age.’ (Chambers’ *Miscellany*, vol. 8, p. 119).”

judged more wisely; for, notwithstanding some questionable dicta, the true conclusion from the authorities seems to be, that it recognizes no artificial presumption in cases of this nature, but leaves the real or supposed superior strength of one of the persons perishing by a common calamity to its own natural weight, i. e. as a *circumstance* proper to be taken into consideration by a jury or ecclesiastical judge, but which, standing alone, is insufficient to shift the burthen of proof. When, therefore, a party, on whom lies the onus of proving the survivorship of one individual over another, has no other evidence than the assumption, that, from age or sex, that individual must have struggled longer against death than his companion, he cannot succeed. But then, on the other hand, it is not correct to suppose that the law presumes both to have perished at the same moment; this would be establishing an artificial presumption against manifest probability. The practical consequence is, however, nearly the same, because, if it cannot be shown which died first, the question will be treated by the tribunal as a thing unascertainable, and that, for all that appears to the contrary, both individuals may have died at the same moment."

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POINTS SELECTED FROM E. D. SMITH'S N. Y. COMMON PLEAS REPORTS.\*

*Action.*—A party suffered his infant child, of the age of seventeen months, to be in a public street of the city, without a suitable attendant; and while she was sitting down in the street, a wagon in charge of the defendant's servant passed over her. In an action by the father of the child, there being no proof of negligence on the part of defendant's servant, other than the mere fact that the wagon was driven by him, *held*, that the plaintiff was not entitled to recover damages for the injury. That any degree of negligence on the part of the servant, would subject his principal to an action, when the plaintiff's own negligence exposed his child, *doubted*. *Kreig vs. Wells*.

Recovery of judgment upon a contract is no bar to a separate action, for the deceit originally practiced upon the plaintiff to induce him to become a party to it. *Wanzer vs. DeBaun*.

\* We have to thank the Reporter for an early copy of this valuable volume.—  
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The want of *ordinary* care on the part of the plaintiff, contributing to the injury, is fatal to an action for damages sustained through the defendant's negligence. *Jacobs vs. Duke.*

Whether a degree of negligence *less* than the want of *ordinary* care, would deprive the plaintiff of a recovery; *quere?* *Id.*

A publication unfavorably reviewing the credit and standing of a mercantile firm, and charging one member thereof with dishonesty, is libelous *per se*; and an action will lie by the partners for the injury to the business or credit of the firm. *Taylor vs. Church.*

A firm may recover for such a libel without proof of special damage. *Id.*

A servant finding a chattel in the master's house, (not being his property,) and retaining it by the master's consent, may maintain an action of trover against a wrongdoer who converts it. *Mathews vs. Harsell.*

Accordingly, where a servant woman found certain Texas notes in the house of her employer, who assumed their custody for her benefit, and entrusted them to the defendant for the purpose of ascertaining their value, &c., apprising him that she (the employer) was acting for the servant, and held the notes for her, and the defendant sold them and appropriated the funds to his own use; it was *held*, in an action brought in the names of the servant and her husband, for a conversion of the notes, that the defendant was liable for the value and interest from the time of their sale by him. *Id.*

Whether a house servant, who finds lost jewels, money or chattels, in the house of his or her employer, acquires any title even to retain the possession, against the will of the employer; *quere.* *Id.*

In an action for the loss of service of the plaintiff's son, caused by an injury received through the negligence of the defendant's servant; the plaintiff is confined to loss of service before suit brought, together with reasonable compensation for the expenses incurred and care bestowed by himself and servants during the illness of the child, and cannot recover for the prospective loss during the minority, unless he has declared specially therefor. *Gilligan vs. New York and Harlem R. R. Company.*

The rule varies from that which applies where the suit is brought by the child himself. Injury to the person is there the *gravamen* of the action. When the parent sues, it is the cause only of the loss, and the loss of service forms the gist of the action. To allow to him a recovery for prospective loss not alleged, would violate the rule, that a party can only recover *secundum allegata.* *Id.*

*Agreement.*—The common law liability of a common carrier for the

safe carriage and delivery of goods, may be limited and qualified by express contract with the owner. *Mercantile Mutual Insurance Company vs. Chase.*

Neither public policy, nor the law of the land, forbids a contract by the owner with the carrier to carry on special terms, whereby the owner shall himself assume and bear the risk of loss from accident or other causes, without actual fault or neglect of the carrier; and such contract, being voluntarily made and upon sufficient consideration, will be enforced. *Id.*

*Appeal.*—Although, after two trials, with a like finding by the jury, the court would not set aside the verdict *merely* because the evidence is deemed greatly preponderating against it, upon a question of negligence; yet, the fact that the jury has also found, on a question of damages, in decided opposition to the views of the court upon the testimony, forms a coincidence, which strengthens the apprehension of bias and partiality, and may require interference, even where, upon either ground alone, it might have been refused. *Gilligan vs. New York and Harlem R. R. Company.*

*Apprentice.*—The recital, in an indenture of apprenticeship, of the age of the apprentice, is only *prima facie* evidence, and may be rebutted. *Drew vs. Peckwell.*

On arriving at the age of twenty-one, the apprentice, notwithstanding such erroneous recital, may elect to abandon the contract or not; and leaving his master's service is evidence of his election. The master has then no right to his service, nor to his wages if employed by others. *Id.*

The defendant, in a suit brought by the master for the services of an apprentice, may prove that the latter, when such services were rendered, had attained his majority, although the fact may appear otherwise by an error in the indentures. *Id.*

*Bills of Exchange and Promissory Notes.*—A bill of exchange, drawn payable at sight, (in the absence of evidence of any particular local custom of the place where it is payable,) is due and payable on presentment to the drawee. *Trask vs. Martin.*

It is not settled, that by the general principles of commercial law, days of grace are allowed on bills payable at sight. The instrument is, therefore, to be construed according to the natural and ordinary import of the language employed. *Id.*

Bills payable in terms on demand—bills, having no time of payment specified, and bank checks, are well settled to be due and payable instantly on presentment. *Id.*

The only harmonious rule on the subject of days of grace, would seem to be, that where time of payment is in terms given to the drawee—as after sight or after date, or by naming a future day—days of grace are to be computed and allowed to him; but where the *terms* of the bill import immediate payment *on presentation*, its terms are, in this respect, to be pursued. *Id.*

It seems that a local custom or usage of the place where it is payable (if any exist,) allowing days of grace on such a bill, may be shown. *Id.*

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## NOTICES OF NEW BOOKS.

Reports of Cases Argued and Determined in the Court of Common Pleas, for the City and County of New York, with Notes, References and Index, by E. Delafield Smith, Counsellor at Law. Vol. I. New York: Jacob W. Halsted, Law Bookseller and Publisher, 1855. pp. 871.

We have been much pleased with the examination we have been able to give this volume of Reports. It is filled with decisions upon points of commercial law and commercial usages, which a court of justice in a great maritime and business city like New York, will constantly be called upon to adjudge. We have presented a few abstracts in this number, of some interesting and important cases, which might have been greatly multiplied, had we been able to devote the space.

Prefixed to this volume, is a History of this Court of Common Pleas, by Mr. Justice Daly, together with an account of the judicial organization of the State of New York, from 1623 to 1846, which is no less instructive than interesting, and is a valuable contribution to our stock of juridical and legal history, and well worthy a careful and attentive study. We specially commend the index to this volume, as one constructed upon the true principles of index-making, letting the reader at once into the very matter in hand, fully, accurately, and succinctly.

The preliminary statements are also carefully constructed, without verbiage, and strictly confined to the points in controversy. We take great pleasure in commending the labors of the learned reporter to professional attention and consideration.

**A Compendium of Mercantile Law.** By the late John William Smith. Third edition, greatly enlarged and revised throughout, from the last English edition, by James P. Holcombe and William Y. Gholson. New York: D. Appleton & Company. 1855. pp. 755.

A book so well known, and so constantly used by the bar, hardly seems to require any notice at our hands; but the very numerous and skilfully arranged American Notes, appear to be a proper subject to which to call the attention of our professional brethren. Compendious treatises on special branches of law, fully annotated, have much value as mere labor-saving works, superseding to some extent the necessity of diligent searchings into numerous and voluminous digests. A skilful presentation of important adjudicated points, in brief notes at the foot of the page, seems, upon the whole, the most satisfactory mode of annotating which professional ingenuity has yet discovered and adopted. And the notes before us are of this very character: comprehensive without being tedious; ample without the fault of prolixity; and doubly useful by the number and method of the citations.

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**An Introduction to the Study of Jurisprudence:** being a Translation of the General Part of Thibaut's "*System des Pandekten Rechts*;" with Notes and Illustrations by Nathaniel Lindley, of the Middle Temple, Esq., Barrister at Law. Philadelphia: T. & J. W. Johnson. 1855.

This is a book which we are extremely glad to see reprinted in the United States. Thibaut's System of Jurisprudence of the Pandects, from which it is in the main translated, is one of the most esteemed of the many remarkable treatises on the Roman Law which have appeared in the last half century. Such is and was its reputation in Germany, a country whose unsparing criticism is satisfied with nothing less than the highest excellence, that it passed through eight editions in the author's lifetime; and has since been made the basis of several elaborate commentaries. In England, where the study of the civil law is begun to be pursued with a zeal unknown since the days of Irnerius, the work has received the most enthusiastic commendation from Mr. George Long, who is probably the person most qualified there to form a judgment on such a subject. Speaking of it in connection with Savigny's celebrated Treatise, he says: "They are characterized by a soundness of knowledge, clearness of expression,

perspicuity of arrangement, and a subtlety and depth of thought, that have seldom been equalled by any writer on the subject, and cannot be surpassed." This praise is not overstrained. We have read carefully the work before us, and though it is not in all respects that which best represents the qualities of Thibaut's mind, we could not but be amazed at the richness of material wrought into the greatest conciseness and precision of form,—at the accuracy of expression which struck invariably the key-note of thought,—at the beauty of analysis, so skilful that it seemed only the natural organic skeleton or tracery of the subject,—at the transparent lucidity of style, so clear as to shew with equal distinctness the profoundest and the simplest of ideas, by which it was characterized. If the metaphor were not too bold a one, we would be tempted to describe the book as crystallized law,—law precipitated, as it were, by its own inherent action, into a structure of the sharpest outlines, and of the purest substance.

All of our readers may not be aware what great progress the exegesis of the Roman Law has made within the present century. Casting off the pedantry by which it was long clogged, it has become emphatically a science. The discovery of the long lost Institutes of Gaius, and of many fragments of Ante-Justinian juriconsults, gave the first and perhaps the most remarkable impulse in this direction. The retrieving of these precious waifs of law, though it added but little directly to the *corpus juris* as it was left by Justinian, and the later Emperors, and as it was actually in force, gave us its historical antecedents in a more connected and intelligible form; and thus converted it at once from a mere positive exposition of legislative will, into the healthy outgrowth of a living jurisprudence, prepared by the normal action of centuries. Much that was misunderstood was thus set right; much that was insensible was thus explained. But the real advance of this study is as much due to extraordinary development of critical sagacity which was inaugurated in history by the school of Neibhur, and naturalized by an easy transition in jurisprudence. As it was said of the great German historian, that he knew early Rome better than Livy, so it may be fairly affirmed of such men as Savigny, Hugo, and Thibaut, that they knew the laws of the Republic better than Justinian, and what is more to the point, the law of Justinian far better and more thoroughly than Cujacius, Vinnius, Voet, or Domat, the lights of a past generation. So great a step forward has been taken, that these older writers have become almost obsolete; highly respected,



indeed, for their industry and acuteness, but supplanted by the superior learning and accuracy of a more scientific age.

In view of a change, a development such as this, it is highly important that the works of some of the most recent as well as the best of the continental jurists, should be introduced into this country for the benefit of those—and their number is rapidly increasing—who desire or find it necessary to acquaint themselves with the principles of the Roman Jurisprudence. The only one of these works which has hitherto appeared in an English dress, is the Manual of Mackeldey. This is a treatise, indeed, of deservedly high reputation. The translation, however, was never completed beyond the first volume; it was overlaid, almost smothered, under a pile of unnecessarily elaborate notes; and it is now, we believe, out of print. Mr. Cushing's revision of Strahan's translation of Domat, is a valuable book, doubtless, a "book which no lawyer's library should be without," but unfortunately the original belongs to an almost extinct race of jurists, palæontological in fact; and we can only regret that the same time and pains should not have been spent upon one of the twenty highly perfected treatises of France, Germany, or Italy, of the present century. Mr. Lindley's translation of Thibaut comes, therefore, at an appropriate time, and supplies a want long felt. The only objection we can urge is one, which perhaps will not have an equal weight with all readers, that the translator has limited his task to the general or elementary portion of the work. We hope that at some future time we may be favored with the special or practical part also.

Of Mr. Lindley's translation we can speak in the highest terms. He has rendered a somewhat difficult original into always clear and idiomatic English; and we know of no better commendation to give. The last portion of the work is composed of well prepared notes, by the translator, containing further explanations of the text from the civil law, and also full illustrations and comparisons drawn from our own law. On looking at the latter, we have found them to be also of value in themselves, by containing references to the most recent English decisions on the subjects of which they treat. The typography of the work is excellent: and, what is a rare merit in American reprints—*haud inexperti loquimur*—the references to foreign works, and the citations from foreign languages, are always accurate.



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## CRIMINAL LAW—HOMICIDE.

A Treatise on the Criminal Law of the United States, 3d edition. By Francis Wharton. Philadelphia: Kay & Brother.

A Treatise on the Law of Homicide in the United States. By Francis Wharton. Philadelphia: Kay & Brother.

The author of every elementary treatise, well arranged and executed, confers a gift of no ordinary value upon his professional brethren, and is entitled to their hearty thanks. Few have the taste, and fewer still the talent, to mould their studies into such a form as shall contribute to the benefit of others, and save them from a laborious search after abstract principles, amidst the cares and pressure of daily business. The value of the results thus gained, rises in proportion to the difficulties of the subject investigated, and to the paucity of those who have preceded the diligent laborer in the field explored. The volume which heads our list, was the first attempt to present a connected and comprehensive view of American Criminal law, and a third edition recently issued shows the favor with which it has been regarded and the appreciation which it has received from those for whose benefit it was designed.

As it has thus stood the test of examination by the practitioner and the student, it would seem almost superfluous to attract further attention towards it, or to attempt an analysis of its contents—and yet, when the second volume under consideration is for the first time presented to the public, it would appear a proper occasion for exhibiting the claims of both to professional regard. Whilst the peculiar branches of jurisprudence which form the contents of these volumes, are not selected by the great majority of lawyers as those in which they desire to practice, and the civil rather than the criminal courts are more usually chosen for the transaction of business, a knowledge of the criminal department of the science in its general features, is necessary in correctly instructing clients in the various matters presented by them for advice in the usual routine of professional life. A choice of remedies when either forum is opened for redress, becomes a matter involving no little responsibility, and by a correct and logical discrimination great perplexity may be avoided, whilst the means to be attained may be reached with more facility than where the knowledge is confused and uncertain. The conflicts between the two jurisdictions frequently involve technical rules and nice shades of distinction, and although the treatise on criminal law may not be needed to assist in the conviction or defence of a malefactor, its presence is always necessary, and the aid which it affords is by no means of a trivial character to every one who is engaged in constant practice.

Under our peculiar political constitutions, the law of this country bearing upon crimes has been essentially modified from that of England. Indeed, so great are the variations, that in some respects it may almost be deemed a system of a different character, except as to the great leading outlines common to both. It has acquired form under the hands of those who have administered justice amongst us, during and since our colonial condition, who in departing from the laws and usages of the mother country in many important particulars, whilst they have avoided giving immunity to crime, have greatly modified the rigor and severity of the British common and statute law, and in many cases extricated them both from the tech-

nical difficulties in which they were formerly involved. Our own State has contributed towards attaining this result, and we notice that our author, in his preface to the Law of Homicide, has rendered an appropriate tribute to the learning and judicial abilities of one, who possessed (whatever defects he may have had,) a master mind, and adorned, by eminent, well digested and well arranged learning, the station he so long occupied. Judge King, the former President of the Judicial District composed of the now city of Philadelphia, commended himself to all who practiced before him as an accurate lawyer, who with great readiness detected the existing impediments in every controversy he was called upon to determine, and seldom failed to apply the key which unlocked its difficulties. His eminence in the criminal department of his Court was always conceded, and his learning and ability have made a deep impression upon that branch of the law in our whole country.

The arrangement of both the works under consideration is admirable and lucid. The student is led by easy gradations, from the consideration of primary and elementary matters to the difficult and complex questions presented in the various subjects treated. The doctrines and positions assumed are elaborated with great care, and fortified by numerous cases which are skillfully inserted into the text, and also referred to in the notes. The duties devolving upon those who must necessarily be employed in the detection of crime, and in arranging the proofs which are requisite to put the case fairly before the court and jury, as well for the protection of the criminal as the furtherance of justice, are accurately stated, and a general knowledge of their great leading principles on the part of those whose duty it is, by a close inspection of suspicious circumstances, to fasten the probability of guilt upon the individual in whom they seem to meet, would obviate much of the uncertainty which is sometimes produced in consequence of their omission through ignorance. We extract from the first volume the mode in which the author illustrates the application of the system of indicatory tests used by the civil law to our own common law practice.

“In the indications which tend to direct suspicion against a person, there is a distinction between those which are important for

the information of the prosecuting officer, and those which authorize him in taking steps for an inquest. The former class, which would authorize him to make inquiries, to cause a person to be closely watched, or even examined without a formal charge, comprise those derived from facts which, without having a particular reference to the special crime committed, tend to show an inclination to the perpetration of offences such as the one under consideration. While it is clear such tendencies or inclinations are inadmissible on trial before a court and jury, it is proper that they should become the subject of investigation, not only for the purposes of the general policy of an arrest, but to enable the prosecution, should character be put in evidence by the defence, properly to rebut it. It will simplify the search after these indications, for the officer to inquire : 1st, what facts lead to the supposition that a particular person was the criminal ; 2d, what facts concern the *effects* of the crime ; or, 3d, what facts appear as necessary conditions of the perpetration, and apply to a particular person. Indications falling under the first subdivisions are : (1) the particular interest a person has in the perpetration of the act, by reason of the advantages accruing to him from the crime, as, where the accused was the heir at law of the deceased, and in impoverished circumstances, or where he had previously secured a will in which he was legatee, or where certain articles, especially documents, are stolen, which are only valuable to a particular person ; (2) threats previously uttered of the crime subsequently committed, or a similar one ; (3) preparations made for the act, by procuring or fitting for use the necessary instruments ; by narrow inquiries into circumstances, e. g., the road which the deceased was expected to take, the knowledge of which was indispensable, or greatly auxiliary to the execution of the purpose, by practice in the arts by which the deed must have been done, or, repeated attempts to imitate handwriting, in cases of forgery, or repeated practice with fire-arms, or other murderous weapons, in cases of homicide, or by preparatory arrangements to commit the crime or to escape detection, as by alluring a person to a distant place where a murder or robbery could be committed.

“ 2d. Among the most significant effects of the crime are : (1)

marks on the person which may be accounted for by the commission of, or participation in the crime, as, stains of blood on his clothes, or wounds given by the victim in self-defence, as, for instance, where the wounded man says he bit his assailant in the arm, and the arm is found to have been bitten, and where the prosecutor struck the robber on the face with a key, and the mark of the wards was afterwards identified there; (2) the possession of the articles known to have been removed when the act was perpetrated, especially where their possession is attended with peculiar care or anxiety in hiding or keeping them, or with uneasiness in the behavior of the possessor, as, for instance, an endeavor to sell the article at any price; (3) intentional removal or destruction of the trace of the crime at particular places; (4) anxious inquiries into the crime, and the judicial measures against the guilty party, or into the suspicious current; (5) disclosures of circumstances which could be known only to one acquainted with the particulars of the crime, especially, boasts of the commission of the deed; (6) attempts to compound the matter with the injured party, or to remove suspicion, or to mislead those occupied with the investigation; (7) uneasy deportment, justifying the supposition of a guilty conscience; (8) flight, to which no proper or reasonable motive can be assigned.

“ 3. The indications derived from the conditions of the crime are such as, (1) presence of the accused at the place at the probable time that the deed was committed; (2) discovery at the *locus in quo* of articles known to have belonged to the accused shortly before; (3) footsteps leading from the place to the dwelling of the party, and which correspond in dimensions with his shoes; (4) the fact of a person being found in possession of instruments particularly serviceable in executing the design in question; (5) particular qualifications, experience, skill pre-eminently adapted for the undertaking, or perfect acquaintance with the localities.”

The question of character as bearing upon the accused, whether offered on his part in vindication or extenuation of the offence charged, or by the prosecuting officer in a doubtful case, to fasten the crime more surely upon the prisoner, has to a certain extent, in the progress of a cause, frequently proved an embarrassing point

to the practitioner: and this, perhaps, not so much from any uncertainty as to the rules of law upon the subject, as to a current opinion amongst the unlearned, that in some way or other, it may be forced into the trial of every prosecution, and used indiscriminately by either side. Indeed, it is difficult to make a layman understand why the whole acts of a man's life, particularly those of a similar nature with which he is charged as a criminal, may not be dragged into the controversy, and made to tell in favor of his guilt or innocence. Indeed, in this respect the current of the civil law seems to run with the popular impression, and the general moral conduct of the alleged offender receives an examination, before a final conclusion is arrived at under that system. In this respect it differs entirely from the maxims of the common law, and the difference between them is carefully and accurately exhibited by our author. We quote here from the work on homicide, although the same point is accurately treated in the book on criminal law:

“It should be observed, however, that while evidence of distinct acts of crime is admissible when tending to show special malice to an individual, or the *scienter*, they cannot be received to prove a tendency to commit the particular class of crimes of which the defendant is accused, and, *à fortiori*, is general evidence of such a tendency inadmissible. Thus, in England, it has been held, that on the trial of a person charged with an unnatural crime, it was not evidence to prove that the defendant had admitted that he had a tendency to such practices; and so on an indictment against an overseer on a plantation, for the murder of a slave, evidence as to the prisoner's general habits in punishing other slaves, is not admissible for the prosecution. It is at this point, indeed, that the common and the civil law diverge. In the first, the issue is, whether the defendant was guilty of the particular offence, and he advances to meet this issue with a presumption of general good character, which nothing but his own election can defeat. No matter what independent crimes he may have been guilty of, or what infamy he may have incurred, unless he invite the investigation himself neither crime nor infamy can be advanced against him. But under the civil law, the issue is not whether the accused com-

mitted the particular offence, but whether his general guilt is such as to make his removal from society a general benefit. To this inquiry, the particular accusation is used merely as an avenue. Thus, by the common law, as has just been seen, the court will check any attempt whatever to show that the defendant's character and antecedents were such as to exhibit a tendency to the particular crime charged; while on these points, by the civil law, the public prosecutor is encouraged to collect as great a mass of details as possible, and to spread it before the court at the outset. Of this distinction, a curious illustration is found in a case which has excited both popular and physiological speculation in Germany. A young woman, in the streets of Leipsic, one night was assaulted by a man in a cloak, who darting from behind a dark corner, struck into her arm, above the elbow, the blade of a small lancet, and having inflicted a slight wound, retreated. He was arrested, and in this country would have been tried for an assault and battery, unless he provoked a widening of the issue. But it had been rumored about a short time previously, that a very remarkable species of monomaniacs had lately made their appearance in Leipsic, called *Mædchen-schneiders*, who were influenced by an uncontrollable propensity to plunge, skin-deep, into the arms of any young maidens whom they could meet, a small lancet. This was brought into the issue; and three questions were presented for investigation, on which a vast amount of physiological refinement, forensic skill, and judicial exposition were spent: 1st, did such a propensity exist; 2d, had it been generally executed; and 3d, was the defendant's moral tone and past history such as to make it probable that it would exert over him a control inconsistent with the convenience and the comities of society? These points, after protracted investigations, were determined against him, and he was convicted and sentenced accordingly.

“A precise counterpart to this, so far as the principle is concerned, occurs in the trial, in London, in 1789, of a man named Williams, who was possessed with a passion the same as that which beset the ‘*Mædchen Schneider*.’ When he was last arrested, he was met with a series of indictments which charged him with



assaulting, in the year 1789, a variety of spinsters; it being averred, by way of description, in each case, that he did 'cut, tear and deface her silk gown,' and 'did cut, strike and wound her.' His manner of inflicting the wound was the same as that described in the text; but so artful and cautious were his movements that it was not until the public were enlisted in unferreting him by permanent advertisements, that he was at last detected. On the first trial he escaped on account of misdescription in the details; but he was remanded to wait his trial for the common assault, upon a number of which he was severally convicted. The narrow issue and brief evidence each case presented, forms a vivid contrast to the elaborate and metaphysical investigation of the civil law. The prosecutrix was called, proved the assault, was followed by medical evidence of the wound, and such testimony as belonged to the *res gestæ*, and then in the second and subsequent trials, the chairman said to the jury, 'you will endeavor, if possible, to forget every thing that passed even yesterday, and to treat this as a new offence; and to treat the prisoner, in your judgment upon him, as if you had never heard of him, but that he was now brought before you, charged with an assault, *proved only by one witness*, but with certain corroborating circumstances.' On the first trial, Buller, J., who never forgot the great guarantees of the common law, was equally emphatic. 'You will totally lay aside every thing you may have heard before you came into this court, and consider the case coolly and dispassionately *on the evidence given.*' "

Of the mode in which technical matters are discussed we present the following as a good example, upon a point of some nicety. After stating the proposition, "that an acquittal on an indictment for the minor offence is generally no bar to a subsequent indictment for the greater," he proceeds:

"It has been frequently held in this country, that where, on an indictment for an assault, attempt, or conspiracy, with intent to commit a felony, it appeared that the felony was actually consummated, it was the duty of the court to charge the jury that the misdemeanor had merged, and that the defendant must be acquitted.



“ It used to be supposed, from the casual remarks of old text writers, that the common law rule was, that whenever a lesser offence met a greater, the former sank into the latter ; and hence, in a large class of prosecutions, the defendant would succeed in altogether escaping conviction, by a subtle fiction having no origin either in common sense or necessity. Conceiving, however, the principle to be too deeply settled to be overruled, the courts of Maine, Massachusetts, New York and Pennsylvania, as has been seen, have held, that where a felony was proved, the defendant was to be acquitted of the constituent misdemeanor, and though the notion was sturdily resisted elsewhere, it has taken deep and general root. The result has been the accumulation of pleas of *autrefois acquit*, in which, through the labyrinth of subtleties thus opened, the defendant has frequently escaped. But lately, on two solemn occasions, all the judges of England have agreed that the doctrine, that a misdemeanor, when a constituent part of a felony merges, has no footing at common law : that the statutory misdemeanor of violating a young child did not merge in rape ; nor a common law conspiracy to commit a larceny, in the consummated felony. The bearing of these cases on the question of *autrefois acquit* is thus stated by Lord Denman, C. J. ‘ The same act may be part of several offences : the same blow may be the subject of inquiry in consecutive charges of murder and robbery. The acquittal on the first charge is no bar to a second inquiry, where both are charges of felony ; neither ought it to be when the one charge is of felony and the other of misdemeanor. If a prosecution for a larceny should occur after a conviction for a conspiracy, it would be the duty of the court to apportion the sentence for the felony with reference to such former conviction.’

“ Cases frequently arise where two offences are committed by the same act, and where an acquittal on the one is interposed on the prosecution of the other. Where the act is indivisible, as where a man is at the same time guilty of a riot and of the breaking up of a religious meeting, or of uttering and of selling forged notes, under the statute, the acquittal, in one case, is a bar to the other ; but where the act is separable into two distinct branches, as where a

man at the same time assaults two persons, or steals a horse and a saddle together, he may be convicted on separate indictments for each offence. Thus, in Massachusetts, where, to an indictment for receiving stolen goods which were the property of A., the defendant pleads in a bar, a former indictment, conviction and judgment for receiving stolen goods, the property of B., and then alleges that the two parcels were received by him of the same person, at the same time, and in the same package, and that the act of receiving them was one and the same, the plea was held insufficient. But in cases of felony, where one of the offences is a necessary ingredient or accompaniment of the other, and where the State has selected and prosecuted it to conviction, it is said there can be no further prosecution on the other."

The most marked distinction between the criminal law of the United States and England, is undoubtedly the division which has been made in most of the States, of the crime of murder into various degrees. The Pennsylvania Act of 1794, creating these grades, necessarily led into an accurate examination of the whole law of homicide, and rendered it incumbent on those charged with the administration of justice, whilst bound by the humane sentiments which dictated its enactment, on the one hand, not so to narrow its meaning within such limits as should render its provisions practically abortive, on the other hand, not to widen its interpretation so as to peril the security which each one reposes in the law, as the guardian and protector of his person from violence. The task was one of no ordinary difficulty, but it was well performed, and the decisions which have been made, as well in our own State as in others of the Union who have imitated our example in this particular, have built up a system, which is so well arranged, accurately defined, encumbered with so few technicalities, and so thoroughly digested that the skillful practitioner finds but little difficulty, after hearing the statement of facts, in determining in which degree the offence is to be classed. A summary of the distinctions between these grades of crime is thus given :

"In fine, wherever the deliberate intention is to take life, and death ensues, it is murder in the first degree; wherever it is to do

bodily harm or other mischief, and death ensues, it is murder in the second degree ; while the common law definition of manslaughter remains unaltered.

“ But however clear may be the distinction between the two degrees, juries not unfrequently make use of murder in the second degree as a compromise, when they think murder has been committed, but are unwilling, in consequence of circumstances of mitigation, to expose the defendant to its full penalties. In such cases, courts are not disposed to disturb verdicts, but permit them to stand, though technically incorrect. Thus, where S. having conceived and declared a design to kill P., the parties met afterwards in front of S.’s own house, and a quarrel ensued, in which S. gave the first offence ; P. proposed a fight ; upon which S. retired for a very brief time into his own house, armed himself with a loaded pistol, which he concealed in his pocket, and instantly returned so armed to the scene of quarrel ; then P. threw a brick at S., which did not hit him, but falling short of him, broke, and a small fragment struck S.’s child, standing within his own door, who cried out, and S. hearing his child cry out, but without looking to see whether he was hurt or not, exclaimed, ‘ He has killed my child and I will kill him,’ advanced towards P., deliberately aimed and fired the pistol at him, then retreating with his face towards S., and the shot took effect and killed P. A verdict of murder in the second degree being rendered, the court refused to set it aside.

“ There are, however, certain features which, in cases of deliberate homicide, draw forth, generally from the court’s instructions to the jury, that by them a deliberate intent to take life is shown. Where a man makes use of a weapon likely to take life ; where he declares his intentions to be deadly ; where he makes preparations for the concealing of the body ; where, before the death, he lays a train of circumstances which may be calculated to break the surprise, or baffle the curiosity which would probably be occasioned by it ; where, in any way, evidence arises which shows a harbored design against the life of another ;—such evidence goes a great way to fix the grade of homicide at murder in the first degree. Thus, where the defendant struck the deceased violently on the head with

a sharp and heavy axe, it was held murder in the first degree, deliberation being shown; and it was said by M'Kean, C. J., 'Let it be supposed that a man, without uttering a word, should strike another on the head with an axe, it must, on every principle by which we can judge human actions, be deemed a premeditated violence.' Where a man loaded a pistol, took aim at, and shot another, it was held murder in the first degree. If one man shoot another through the head with a musket or pistol ball,—if he stab him in a vital part with a sword or dagger,—if he cleave his skull with an axe, or the like,—it is almost impossible for a reflecting and intelligent mind to come to any other conclusion than that the perpetrator of such acts of deadly violence intended to kill. Where the defendant deliberately procured a butcher's knife, and sharpened it for the avowed purpose of killing the deceased; where he concealed a dirk in his breast, stating, shortly before the attack, that he knew where the seat of life was; where he thrust a handspike deeply into the forehead of the deceased; the presumption was held to exist, that the killing was willful. But it is not necessary, to warrant a conviction of murder in the first degree, that the instrument should be such as would necessarily produce death. Thus, where the weapon of death was a club not so thick as an axe-handle, the jury, under the charge of the court, rendered a verdict of murder in the first degree, it appearing that the blow was induced by a deliberate intention to take life. The same presumption of intention is drawn with still greater strength from the declared purpose of the defendant. Thus, where the prisoner, a negro, said he intended 'to lay for the deceased, if he froze, the next Saturday night,' and where the homicide took place that night; where it was said, 'I am determined to kill the man who injured me;' where the prisoner had declared, the day before the murder, that he certainly would shoot the deceased; where, in another case, the language was, 'I will split down any fellow that is saucy;' where the prisoner rushed rapidly to the deceased, and aimed at a vital part; where a grave had been prepared a short time before the homicide, though the deceased was not ultimately placed in it, the whole plan of action being changed; in each of these cases

it was held murder in the first degree. It must be noticed that premeditation, in the eye of the law, has no defined limits; and if a design be but the conception of a moment, it is as deliberate, so far as judicial examination is concerned, as if it were the plan of years. If the party killing had time to think, and did intend to kill, for a minute, as well as an hour or a day, it is a deliberate, willful, and premeditated killing, constituting murder in the first degree. The evidence by which intent can be proved or inferred has already been fully considered."

Our author has not failed to treat skillfully another question, which has been greatly mooted, and in which the respective rights of the court and jury, instead of being made to harmonize, have frequently been suffered to clash. A looseness of practice has to a certain extent prevailed, in ascertaining whether the jury are, in criminal cases, judges of the law as well as of the facts, and it has often been confidently asserted, that both trusts are committed to their final decision. This impression has gradually been effaced, and the modern tendency which it is hoped may prevail, has been, as well in criminal as in civil offences, to limit the rights of the jury to a decision of the facts of the case, under the direction of the court as to the law. Says our author:

"Whenever, and as often as the finding of a jury is in point of law against the charge of the court, a due regard to public justice requires that the verdict should be set aside. On this principle, it is true, the doctrine of *autrefois acquit* grafts an important exception; but this exception arises, not from the doctrine sometimes that the jury are the judges of law in criminal cases, but from the fundamental policy of the common law, which forbids a man, when once acquitted, to be put on a second trial for the same offence. When a case is on trial, the great weight of authority now is, that the jury are to receive, as binding on their consciences, the law laid down by the court; and after a conviction it is hardly doubted in any quarter that if the verdict be against the law it will be set aside.

"For some time after the adoption of the federal constitution, a contrary doctrine, it is true, was generally received. In many of

the States, the arbitrary temper of the colonial judges, holding office directly from the crown, had made the independence of the jury in law as well as in fact of much popular importance. Thus John Adams, in his diary for February 12, 1771, in a passage which is probably either an extract from or memorandum of a speech before the colonial legislature, urges that in the then state of things, public policy demanded that not only in criminal but in civil cases juries should be at liberty to take the law in their own hands. It is not to be wondered at, therefore, that the early judges both of the federal and state courts should have continued for some time to assert a doctrine which, before the Revolution, they had found so necessary for protection against oppression and persecution. To this may be added what in another place has been noticed more fully, that the Federal Supreme Court in particular, which was for some years so deeply immersed in politics, as to withdraw from its judicial duties most of its interest and a large part of its attention, was unwilling to assert any prerogative which might draw odium on itself, or expose the new constitution to any additional shock. Hence it was that Judge Chase not only broadly denied that the courts had any power to pronounce on the unconstitutionality of statutes, but over and over again declared that the Supreme Court was to be treated as possessed only of such powers as the legislature might from time to time impart to it. At the very time that this eminent but arbitrary judge,—(whose arbitrariness, however, was much more of the temper than of the understanding, always impetuous in asserting authority, always backward in assuming jurisdiction,) was keeping the bar in an uproar by his assaults on counsel and witnesses, he was prompt in conceding to the jury as good a right to judge of the law as he had himself. Thus in *Fries' case* he said, 'The jury are to decide on the present and in all criminal cases, both the law and the facts, on their consideration of the whole case.' 'If, on consideration of the whole matter, *law as well as fact*, you are convinced that the prisoner is guilty, &c., you will find him guilty.' No better illustration of Judge Chase's character can be found than in the fact, that in the very case where he thus recognized the power of the jury over the law, he suc.

ceeded, by stopping counsel when they undertook to dispute the law he laid down, in raising a turmoil, which ended in his own impeachment.

“That Judge Chase was not peculiar in his view, appears from the testimony taken during Judge Chase’s trial, of Mr. Edward Tilghman, a lawyer not only of great eminence, but of political sympathies which would have kept him from any ultra democratic tendencies. ‘The court generally hear the counsel at large, on the law, and they are permitted to address the jury on the law and on the fact; after which the counsel for the State concludes; the court then states the evidence to the jury, and their opinion of the law, but leaves the decision of both law and fact to the jury.’ To the same effect, also, is Mr. Hays’ evidence as to the state of practice at the time, in Virginia.

“But it was not long before it was found necessary, if not entirely to abandon the rule, at least practically to ignore it. If juries have any moral right to construe the law, it became essential to know what was the construction they would adopt; and the most strenuous advocates for the abstract doctrine soon confessed that the notions of juries even on fundamental questions, varied so much that it was difficult to report, much more to systematize them. And yet, if it were really settled that a jury’s view of the law of a case was authoritative, it was vital to the community to know what such view was. Take, for instance, the statutory cheats growing out of the laws abolishing imprisonment for debt. The tendency of legislation in late years, has been to relieve a debtor from imprisonment in all cases except where a willful false pretence is the consideration for the debt, or where there has been a subsequent fraudulent disposal of the acquired property. The tendency of judicial decision is to construe these exceptions strictly, and to hold that to entitle a creditor to avail himself of them, he must show that he had not the opportunity of detecting the false pretences at the time,—that it related to an alleged existing fact,—or that the property secreted was actually and fraudulently detached from an honest and vigilant execution. These views are well known to the community; they enter into every contract, and are binding with



the courts. But what would a jury say? At one time a false promise would be held within the statute, and thus the whole non-imprisonment for debt laws repealed, for the chance of such a thing happening would be even more fatal to a systematic business dealing, than its certainty. At another time, nothing under a most flagrant act would be held a false pretence at all. Or take, for instance, malicious mischief at common law, about which even among the courts there is already sufficient diversity of opinion. Certainly with jurors, no settled rule could be had as to what the offence is, or if there was, no one could undertake to report it, and its reasons. Or again, when the question whether the uncorroborated evidence of an accomplice is enough to convict in a particular case,—a question in which the judiciary of almost each State holds a distinct shade of opinion,—where would be the chances of uniformity of adjudication, if juries, acting on the particular circumstances at hand, were to be the arbiters?"

We cannot make further extracts from the volumes under consideration, without extending our article to an unusual length. The practitioner who confines himself principally to the civil courts, will find treated in the book on criminal law, with great care, those subjects where both tribunals afford remedies, and where, for the immediate redress of a wrong, or the assertion of a right, a prosecution may be a more efficacious and speedy remedy than the tedious process of an action. We instance the questions growing out of the statutes relative to false pretences, and the various decisions relative to forcible entry and detainer, and malicious mischief, some knowledge of which is indispensable in the daily routine of business.

We can safely commend both these works into the hands of the student and practitioner. To the former they will prove text books of great value, and serve to impress upon the mind a branch of jurisprudence which is of great utility in the formation of professional character. To the latter they are invaluable as works of reference, and there are few whose practice is so limited as not from time to time to render a standard work on criminal practice an indispensable portion of a library.



## RECENT AMERICAN DECISIONS.

*Circuit Court U. S., East. Dist. of Louisiana, November, 1854.  
In Admiralty.*

## THE STEAMERS MAGNOLIA AND AUTOCRAT.

SHUTE vs. GOSLEE; GOSLEE vs. SHUTE.

1. Duties of steamers in the navigation of the Mississippi.
2. A steamer leaving the ordinary and usual track of vessels under the circumstances, is bound to show some palpable necessity for the deviation.
3. An ascending boat, running at great speed in a dark night, at a time when a descending boat is visible, of whose course she is doubtful, takes the risk of a collision: she ought to ease or stop her engines, till she is assured of the course of the other.
4. A steamer is responsible for a collision which a better lookout than she had might have prevented.
5. Where a collision is produced by the fault of one boat, she cannot complain that the other had not used extraordinary measures of precaution before, or the clearest judgment in the selection of the method of extrication after, the collision became imminent.

The facts of this case are fully stated in the opinion of the Court, by

CAMPBELL, J.—These are cross appeals from a decree of the District Court, pronouncing a division of the damages sustained by the respective parties in a case of collision.

In February, 1851, the steamboat Autocrat, (of the largest class,) bound on a voyage up the Mississippi river, had a collision with the steamboat Magnolia, (of the same class,) near Butler's plantation, in the parish of Iberville, and was sunk, occasioning the death of several persons and the loss of the boat.

The libel charges that the Magnolia was seen rounding out from Robertson's wood-yard, on the east bank of the river, and going apparently *square* across. That the pilot of the Autocrat tapped

her alarm bell, to signify her intention to go to the right, and proceeded towards the east bank; and then the Magnolia tapped her bell, signifying her intention also to go towards the east bank, and did so accordingly;—thus the boats were brought into collision, by this unskillful or reckless procedure. The Magnolia answers, that she was rounding out from Robertson's wood-yard, on the starboard wheel only, and had reached to near the middle of the river, and was nearly stationary, her head pointing down, when the Autocrat, with a full head of steam and with great rapidity, "came upon her"—that the Autocrat left her usual and proper track without any necessity, to come upon the proper track of the Magnolia, and in disregard of the signal bell, which she rang upon the first perception of this movement. This abandonment of the proper track of the Autocrat, and this neglect of the signal bell, are pleaded as the causes of the great calamity:

The officers of the respective boats who were on duty at the time, have been examined, and to them we are indebted for an account of what took place. I conclude from that testimony, that the collision took place a short distance above Butler's house, about one hundred miles from New Orleans, and near the middle of the river; that when the Magnolia left Robertson's Landing the Autocrat was crossing from the head of Bayou Goula bar to the western bank of the river, with the view of prosecuting her voyage along that bank, aiming to come close to it, near Butler's house, and was, when first seen, nearly two miles from the Magnolia; that when the Magnolia commenced her movement this purpose of the Autocrat was discovered, and that her officers acted upon that conclusion, and that the fact that the Magnolia was a descending boat, was ascertained by those aboard of the Autocrat when she was a mile distant; that the course of the Autocrat was about midway between the west bank and the middle of the stream until the signal bell referred to in the libel was rung, and that her velocity was fully ten miles an hour. In reference to the signal bells, in comparing the different accounts, my conclusion is that the bells were rung almost simultaneously, the Autocrat ringing hers first, but that the signal of the Magnolia was not rung as a reply, but that it was an anxious,

convulsive movement, to warn the Autocrat of the imminent risk and peril of the course she was taking, and to admonish her to desist, rather than a response. I cannot understand the evidence of the officers of the Magnolia to bear any other interpretation.

The pilot of the Autocrat furnishes the following explanation of his conduct:—"They were pretty nearly a mile apart, when he made up his mind she (Magnolia) was a descending boat, from the way she was worked. It was then witness varied his course from the line leading to X, (a point on the map near Butler's and near the west bank,) and straightened the Autocrat up stream so as to give the descending boat room to pass on the right shore. If witness had not varied his course under this impression, and with the desire to give more room to the Magnolia, but had continued on to the letter X, he thinks the collision would not have taken place, as the Magnolia continued rounding out into the middle of the stream. But if he had gone to letter X, and she had continued down the river and kept the shore, as I supposed she would do, we would most inevitably have come together, and it was to avoid this that I diverted from the course to the letter X."

We have here an explanation of the conditions in which the Autocrat was placed, the motives which they originated with her pilot, and the conduct which resulted.

The testimony proves that the pilot misconceived the design of those who managed the Magnolia. This is shown by his own statement. He says, "up to the time he rang the signal bell he thought the Magnolia was going into the right shore, but perceiving from her bow that she was leaving the bend, or the west bank, I rang the signal bell." He was also mistaken as to the mode in which the Magnolia was managed, and her rate of speed—for he "judges that both boats were running at the same rate of speed."

These misconceptions require me to examine into the condition of the boat in reference to watches and assistance available to the pilot. The captain of the Autocrat was not on duty. The mate who supplied his place "was sitting behind the chimneys," and was only aroused by the tapping of the bell of the Magnolia. He then came forward, but so little did the pilot profit by his pre-

sence, that he testifies the mate went below at this critical moment. There was a watchman in the pilot-house, but he seems to have said nothing. The mate and watchman, however, testify they had observed the *Magnolia* was moving on one wheel, and the engineer had no doubt, from her movements, that she was a descending boat. The inquiry will arise, whether the *Autocrat*, "which does not answer her wheel readily," was sufficiently supplied with efficient and active officers and men at this time. For the present, we will consider the facts contained in the statement I have quoted from this testimony. The course from which the pilot departed was certainly the correct one. He says, "the line witness has marked on the map, terminating at X, he would have run if the river had been entirely clear and he had no boats descending." That is the usual course for ascending boats of the *Autocrat's* size at the then stage of the water." The pilot, Paris, also of the *Autocrat*, says: "In running the river at the stage of the water at the time of collision, witness has been in the habit of holding a straight course from the head of Bayou Goula bar to the point above Butler's house, falling in to the left shore, ascending, about Butler's house, and this is the usual manner of running the river at that point at low stage of water."

These opinions are sustained, and the evidence of the practice supported, by the mass of the pilots who have been examined. This narrows the inquiry to an examination of the causes for the deviation in the circumstances of the particular case.

The *Magnolia* had an equal right to pursue her voyage, and was subject to the same conditions as the *Autocrat*, to adopt the ordinary and reasonable precautions, which skill and experience had ascertained, to avoid disasters. When her officers came to the deck to arrange for their departure from Robertson's, they were to consider whether the necessary evolution of bringing her out and around, could be performed without crossing the track of the *Autocrat*, and without awakening a well-grounded apprehension of such a peril. The *Autocrat* was within sight, and had indicated her character as an ascending vessel. It is a favorable circumstance in the case of the *Magnolia*, that both her pilots were now on deck, and her

movements were conducted at first under the observation of both, and also, that the captain was at his place and attentive to his duty.

No doubt seems to have been felt by either of these experienced men, that they could bring their vessel to its proper place without peril ; and the result shows that she performed her circuit and was in the middle of the stream when the collision occurred, and was nearly abreast of the point X, on the west bank, to which the Autocrat had been directed.

In this connection the statements of the protest of the officers of the Autocrat and of the witnesses, to the place of collision, are important. There is, too, the confession of the pilot, that but for his deviation there would have been no collision.

Was the movement of the Magnolia proper, and properly performed ? It is a fact to be noticed, that neither in the protest, nor in the libel, nor in the testimony of the pilot of the Autocrat, who was on duty, is there any complaint of the departure of the Magnolia from the landing in the manner and at the time it was performed. The attention of the pilot at the wheel was brought directly to the point, and his answers are clear and exculpatory. He says : " Witness would have done as the pilot of the Magnolia did to get her head down stream, from leaving the wood-yard." He describes the manœuvre he would have executed, corresponding to that performed by the Magnolia. The pilot, Robb, of the Magnolia, says : " From what I saw of the collision, I believe the Magnolia was managed as well as she could have been. In descending the river at that point, boats keep in the middle of the river ; the ascending boat, at that stage, crosses over into the bend, just above Bayou Goula, and runs the right shore for four or five miles. In saying everything was done that was proper, by the Magnolia, to avoid the collision, I say the engine was stopped ready to back, and the boat was in her right place in the middle of the river, and on her right course."

The pilot, Duffey, examined for the libellants, says : " The proper course for an ascending boat, at Butler's, and for a mile above, is close in to the left shore, ascending ; at Butler's, the descending

boat should be about the third of the river from the Butler shore, with her head pointing about one hundred yards above Bayou Goulabar." The pilot, Scott, says: "The descending boat, about Robertson's wood-yard, ought to be in the middle of the river." Captain Thomasson, of the *Magnolia*, says: "The *Magnolia* was in about the middle of the river at the time of the collision, if anything slightly nearer the Butler shore, just in the position she would have been, as a descending boat, if she had not made a stoppage, except her head was pointing, &c. &c." The weight of the testimony is, that under ordinary circumstances, the middle of the river is the proper place for the descending boat at this place. But it sometimes happens that the descending boat, for business objects, or to take the bend below, crosses to the western bank, and in the present case a recollection of this influenced the pilot of the *Autocrat*. The allegation of the libel is, that the *Magnolia* was apparently going *square* across the river. The officers of the *Magnolia* disprove this allegation, and say there was no design to cross the river; that she moved with one engine, her larboard engine being at rest, and that they came around as quickly as possible, "rounding all the time," and were ready to go ahead when the diverging movement of the *Autocrat* was discovered, and then orders were given to stop the engines, which were promptly obeyed. The evidence is not clear as to the length of the circuit described by the *Magnolia*, nor as to the space required for this evolution; but there is reason to conclude that within two-thirds of the distance across the river it could be performed with facility, and was so on this occasion. Without any headway of consequence from the time the *Autocrat* took the alarm, we find the *Magnolia*, at the time of the collision, in the middle of the stream—her range to the west of that line could not have been a wide one.

Before proceeding to the complaint presented in the libel, I will notice the testimony of the pilots examined by the parties, and especially those by the libellants, relative to the management of boats and the customs of the river. I select the testimony of Capt. Swan, with the view of collecting about it the mass of concurring opinion that these depositions afford.

1st. He says: "If a steamboat upon a descending trip were at a wood-yard at night, and another boat should be coming up, *and so near that a meeting would take place by the time the descending boat could make her rounding*, it would be imprudent for the descending boat to start out or leave the shore.

2d. "That he has frequently rounded out when there was an ascending boat in sight below him, but not when such boat was very near.

3d. "Thinks, if a boat was within a mile of him, of a dark night, it would not be safe to round out.

4th. "If a boat were more than a mile below, there ought not to be more danger from rounding out than from meeting a boat in a dark night.

5th. "If a descending boat was rounding out, and had her head down stream, and a collision were to occur between her and an ascending boat, in a part of the river where the descending boat was in her proper place, and the ascending boat out of her proper place, witness does not think the fact of collision would be evidence of imprudence in the descending boat rounding out."

This testimony was given in the direct and cross-examination, and applies to the case I have examined. The witnesses generally lay down the first proposition as it is found in the foregoing statement.

The imprudence of leaving the shore is ascertained by the test, "whether the boat would cross the line of the ascending boat's course;" and some of the witnesses used these words, (Allen and Clements.) Duffey says, "she ought not to leave unless she had time to round out, get across the river, and straighten down under headway, before *meeting* the ascending boat."

A number of the witnesses, looking to the facts that the river at this place is wide, straight, and deep, with ample room for either boat to move in her appropriate track, without interference, find no reason for any restriction when a descending boat, under the circumstances, and say there is none in the daily management and conduct of boats. Without declaring any judgment upon this, my opinion is that the *Magnolia* did not fall under any of the restric-



tions found in the testimony of this witness, and those who agree with him.

Upon his re-examination, the same witness (Swan) says, "he thinks it would be more proper in an ascending boat, seeing a descending boat leaving and rounding out from Robertson's, to make for that shore, and for the descending boat to make for the other shore, and thus a collision would be avoided. This would be proper, no matter what, under ordinary circumstances, was the proper track of an ascending boat.

2d. "But, if he were dropping in to the left bank, ascending, and he were to see a descending boat rounding out from the opposite bank, and so far round that her bow was pointing down in the direction of the ascending boat, *but still rounding out*, witness's boat being nearer the left shore than the right, he thinks the proper course for the ascending boat to avoid the collision would be to keep to the left shore."

These opinions are received with more hesitation by the body of pilots, and the weight of the opinion is, that the ascending boat would hardly be justified in leaving her appropriate shore, by the single fact of seeing a boat coming out. But if the ascending boat were to promptly pass to the shore left by the other, *before the other came round*, the chance of collision would probably be avoided.

With this qualification, the opinion seems unobjectionable.

The Autocrat did not cross to the shore left by the Magnolia. Her pilot, assuming that the Magnolia designed to cross the river at a point above him, made a provision for that contingency, but made none for the more probable contingency of her descent in the ordinary and usual manner.

On the contrary, he took the measures which brought about the collision, when the contingency occurred. His testimony is, "the reason he indicated his intention to go to the starboard was, that the Magnolia was at the time closer to the right bank, descending, than the Autocrat was, and he could not go to that shore without crossing her bows. When the Magnolia gave her signal, he does not think she was more than from three to five hundred yards distant. The



Magnolia was coming round, when she rung her signal, and so continued until she struck the Autocrat. He did not know whether she was on one wheel or two, but he knows she never stopped." On his cross-examination he says: "Up to the time he rung the signal bell, he thought the Magnolia was going in to the right shore, (western,) but perceiving from her bow that she was leaving the bend or the right bank, he rung his bell, &c."

At this time the Autocrat could not have been more than one-third, or perhaps fourth, of the width of the river from the western bank. The Magnolia was then rounding, and upon a single wheel, with but little headway, and, upon the sight of the Autocrat's movement, immediately suspended the action of her engine. The course of the Autocrat was direct to the opposite bank, and her velocity was great, yet she encountered the Magnolia in the middle of the stream. The Magnolia could not, within the time, have materially altered her position with respect to the opposite shores. The testimony of the captain, mate, pilots, watchman, steward, and one passenger of the Magnolia, is, that they saw the approach of the Autocrat from the western bank. The pilot says: "When the Magnolia had got nearly round, and when deponent, who was at the wheel, had slacked her up, and was about to go ahead with the larboard engine, he perceived the Autocrat leaving the right bank, and coming towards the Magnolia. Deponent then, instead of going ahead, on the larboard engine, stopped the starboard, and rang both bells to back. The Autocrat was then heading towards the wood-pile we had left, and we were heading down stream. It was not more than a minute after deponent rung the engine bells to back, before the collision took place." The captain says, "that seeing this movement of the Autocrat, he exclaimed to the pilot to stop the engines and to back the boat, and that he rung the signal bell, and that the second tap of his bell, and the single tap of the bell of the Autocrat, were simultaneous."

The statements of these officers are sustained by the evidence of witnesses on their respective boats.

I do not look for concordance in the statements of witnesses in these cases. Discrepancies must arise, in consequence of the ex-

citement and alarm under which witnesses receive their impressions. Especially must we look with hesitation upon all statements in regard to time and distance, and in this case, the exact solution of the questions of fact materially depend upon evidence in regard to time and distance. This exhibition of the evidence is sufficient to enable me to declare the opinion I have formed upon the whole case.

I am forced to the conclusion that an important cause which operated to produce this melancholy catastrophe, in which life and property were sacrificed, is that the Autocrat had not on duty a complement of *efficient* and attentive officers and men at this time. The character of the pilot is good, his testimony in the case is clear and frank, and, with competent aid, seems to have been adequate to the duties of his place. For any practical purpose, he was the only person in charge of the boat. The mate was where he could see nothing—the watchman said nothing—the captain was asleep in his room. The pilot having thus a large boat, running with great speed, not easy of management, commits a series of mistakes which have led to fatal consequences. When he ascertained the *Magnolia* was a descending boat, he supposed she was moving *square* across the river. He did not discover that she was moving only on a single engine; and at the last, when she was a sluggish mass, nearly stationary, supposes she was running with the speed of the Autocrat. I cannot but think that if he had obtained the information which an intelligent and responsible officer, stationed in front of the vessel, (10 Howard, 557,) would have given, this calamity might not have taken place. In the important case of the *Mellona*, 5 Notes of Cases, 450, the Judge of the Admiralty Court says: “With respect to the second proposition, I worded it very carefully, I asked the Masters whether, if there had been a good lookout, there was a *possibility* that the collision might have been avoided; and the answer was, that such a *possibility* did exist; and I am of opinion, in point of law, that if there had been previous negligence, in not keeping a good lookout, then that party is responsible for all the consequences which might by *possibility* have been prevented. If, indeed, a party is to blame, but by no possibility whatever

could injurious consequences have resulted from that culpability, then the Court might not hold him responsible; but if a party is to blame in the manner in which it is now satisfactorily established this party was to blame, I hold that he is liable for the consequences, which, *by possibility*, he might have prevented." The cases of the *Iron Duke*, 2 W. Rob. 378, and *Europa*, 2 Eng. L. and Eq. 557, are to the same effect.

The Supreme Court of the United States, 12 Howard S. C. R. 443, employs, in the case of the *Genesee Chief*, a line of argument and a force of expression which are applicable to the circumstances of this, and the case of *St. John vs. Paine*, 10 Howard, 557, has an important bearing upon it.

In the navigation of the Autocrat there were two capital errors, which materially contributed to produce this disaster, and its fatal consequences. This boat was run in a dark night, at great speed, (some rating it as high as twelve and fourteen miles an hour,) at a time when a descending boat was visible, and the pilot at her wheel doubtful of the course she was taking. This pilot, testifying under the belief that the speed of the two boats was alike, says: "If the *Magnolia* had stopped, the collision would not have taken place." But the *Magnolia* was nearly stationary, and it was to the excessive celerity of the Autocrat that we must charge this misadventure, which left no time for prudential calculations, or for measures of evasion or escape.

It is certainly true, that commerce has greatly profited from the energy and daring that are displayed in the steam navigation of the United States. But the convenience and profit of commercial men must be held subordinate to the security of life and property, and no prospect of commercial advantage can justify or excuse those who employ this great power in exposing incautiously to peril the lives and property confided to them. Under the circumstances, the pilot should have eased his engines or stopped his boat, until he was assured there would be no collision; 3 W. Rob. 75; 2 W. Rob. 202. Nor was the Autocrat justified in attempting to cross the river at the time her signal bell was rang. This manœuvre was commenced when the circuitous movement of the Mag-

nolia was apparent, and her direction to the middle of the stream ascertained. The pilot (who seems to have discovered this after the engineer and watchman) then left the ordinary and usual track of vessels of this class, and in doing so, encountered a descending boat at her proper place in the river. There may be circumstances which suspend the rules and usages of navigation, and make a rule for the particular case; but the circumstances must be controlling. A pilot cannot depart from a rule upon a surmise, conjecture, or a speculation on probabilities. He assumes, in every case of a departure, to show a palpable necessity. If this were not so, there could be no confidence in navigation, no assurance to pilotage—perils would be increased, and security correspondingly diminished. The *Flint*, 6 Notes of Cases, 271; the *Gazelle*, 5 Notes of Cases, 101; 1 W. Rob. 471.

The *Magnolia*, from the time her officers discovered the *Autocrat* to be an ascending boat, to the time the signal bells were rung, was managed with reference to the fact that the *Autocrat* had a track defined by the usages of the river navigation, which they were not to encroach upon. That this was not done, is apparent from the evidence already quoted.

In the circumstances attending the use of the signal bells, which formed the *gravamen* of the complaint of the libellant, I can find no ground for a decree against the *Magnolia*. It is probable that the conduct of the officers at the time was injudicious; but conceding that a responsive affirmative of the signal of the *Autocrat* would have been preferable, in the facts of this case, the responsibility would not have been changed by this failure. The circumstances of peril were then imminent, creating apprehension and confusion of mind. The inquiry must be, whose fault was it that such conditions existed? A party who has involved himself and others in peril, cannot be heard to complain of their want of the clearest judgment in the selection of the modes of extrication.

Upon a careful examination of the testimony, I do not find the charges of ignorance, recklessness, or neglect of the rules of river navigation, made against the officers of the *Magnolia*, sustained.

By remaining at the landing place, by the free use of signals and other measures of strict caution, which are always praiseworthy, the *Magnolia* might have avoided the catastrophe. She would thus, by extraordinary care, have been secured against the faults I have exposed in the management of the *Autocrat*. But it would be unjust to give a sentence of condemnation for her failure to provide for remote and contingent dangers, arising from the errors of those who require the indemnity.

The importance of this case, the sacrifices of life and property which so often occur in cases of this description, have led me to sift the questions of law and fact, which arise upon the record, and to expound at length the doctrine of the Court applicable to them.

A firm and impartial enforcement of these doctrines will serve to promote order and security in this vast department of the social economy, and give stability to the interests embraced within it.

Decree of reversal; libel dismissed, with costs.

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*In the U. S. District Court for the Eastern District of Louisiana,  
in Admiralty.*

B. L. MAITLAND & CO. vs. THE BRIG ATLANTIC.

1. Where A, the master of a brig, puts into a foreign port, by reason of a leak, and there borrows money from B, and draws a bill of exchange upon C, which bill is unpaid at maturity, and at the same time that the bill is drawn, he also executes a mortgage or hypothecation, in which there is a special stipulation that B is not to take the usual marine risks in cases of bottomry and hypothecation, neither instrument establishes a lien upon the brig, which can be enforced in the Admiralty, for want of jurisdiction.
2. The essential difference between a bottomry bond and a simple loan is, that on the latter, the money is at the risk of the borrower, and must be paid at all events; in the former, it is at the risk of the lender during the voyage, and the right to demand payment depends on the safe arrival of the vessel.
3. Admiralty cannot enforce a claim for money which has been advanced on the personal credit of the vessel owner or master, in a suit *in rem*.
4. Where a bill is drawn, and a bottomry bond taken for the same sum, the bill must share the fate of the bond.

The opinion of the Court, in which the facts sufficiently appear, was delivered by

MCCALEB, J.—The libel in this case alleges that prior to the 12th of December, 1853, the Brig Atlantic, while on a voyage from Philadelphia to New Orleans, with a cargo of coal, sprung a leak, and went into the port of Key West for repairs, to enable her to complete her voyage. That the master, Henry C. King, being a stranger in Key West, and being in want of money to pay for the necessary repairs, and having no other means of procuring the same, borrowed of the commercial firm of H. H. Wall & Co., at Key West, the sum of eight hundred and thirteen dollars and twenty-one cents, upon the hypothecation and mortgage of the brig, her cargo and freight.

It is further alleged that, in consideration of said advance, the master drew his draft or bill of exchange for the sum of eight hundred and sixty-two dollars, which sum included the loan for repairs, and six per cent. thereon for interest and commission. The draft was drawn upon Henry Simpson & Co., of Philadelphia, payable one day after sight; and in order to secure the payment thereof, the master, by a certain instrument of writing, dated 12th December, 1853, and executed before a notary public at Key West, hypothecated and mortgaged the brig, her cargo, freight, apparel and furniture, unto the said Wall & Co. The draft was duly assigned by Wall & Co. to the libellants, who, after due diligence, not being able to find the drawees, caused it to be protested for non-acceptance and non-payment, and gave notice thereof to the drawer. This action is now instituted to hold the brig liable for the payment of the amount of the draft. Both the draft and instrument of hypothecation and mortgage are annexed to the libel as part thereof. The latter, after the usual terms of hypothecation and pledge, concludes with the following stipulation: "It is expressly understood and agreed, that the said Wall & Co. do not take upon themselves the marine risks usual in cases of bottomry and hypothecation."

To the libel an exception had been filed by the claimants, to the effect that this Court, as a Court of Admiralty, has no jurisdiction to enforce the payment of the sum demanded.

It is evident that an extravagant rate of interest has been exacted by the house of Wall & Co., and it is this fact, coupled with the stipulation in the instrument of hypothecation, to which reference has just been made, which forms the basis of this exception. Although the lender of the money seems to have intended to secure the payment of the draft, by exacting both a mortgage on the ship, and a pledge of the merchandise laden on board also, the instrument cannot be properly regarded either as a bottomry bond or as a security in the nature of *respondentia*. That the master had a right, in this instance, in a port of a state other than that of the residence of the owner, to raise money for the payment of the necessary repairs done upon the brig, by pledging the ship, cannot be denied. And if the Court could regard the instrument before it in the light of a bottomry bond, with the usual stipulations, it would feel itself compelled to exercise jurisdiction to grant the party relief. There would be a clear and well established lien upon the vessel, which, according to the principles of the maritime law, could be enforced in the Admiralty.

Contracts of bottomry are so called, because the bottom or keel of the vessel is figuratively used to express the whole body thereof; sometimes, also, but inaccurately, money lent in this manner is said to run at *respondentia*—for that word properly applies to the loan of money upon merchandise laden on board a ship, the repayment whereof is made to depend upon the safe arrival of the merchandise at the destined port. In like manner, the repayment of money lent on bottomry does in general depend upon the prosperous conclusion of the voyage; and as the lender sustains the hazard of the voyage, he receives, upon its happy termination, a greater price or premium for his money than the rate of interest allowed by law in ordinary cases. The premium paid on these occasions depends wholly on the contract of the parties, and consequently varies according to the nature of the adventure. Abbott on Shipping, 150, 151. The high rate of interest exacted by the lenders in this



case, would, therefore, be no valid objection to the libellants' recovery, if it appeared from the act of hypothecation that the usual maritime risks had been incurred; but, so far from this being the case, the clause in the act of hypothecation, to which reference has been made, expressly declares that no such risk was to be assumed. The essential difference between a bottomry bond and a simple loan is, that in the latter the money is at the risk of the borrower, and must be paid at all events; in the former, it is at the risk of the lender during the voyage, and the right to demand payment depends on the safe arrival of the vessel. And if the lender of money on a bottomry or respondentia bond be willing to stake the money upon the safe arrival of the ship or cargo, and to take upon himself, like an insurer, the risk of sea perils, it is lawful, reasonable and just, that he should be authorized to demand and receive an extraordinary interest, to be agreed on, and which the lender shall deem commensurate to the hazard he runs. But a bond executed as an hypothecation, but not upon the principles which govern such securities, is not a bottomry bond, capable of being enforced in a Court of Admiralty, but must be proceeded as at common law. It is absolutely necessary that the liability of the lender to the sea risks should appear or be fairly collected from the instrument; otherwise, the reservation of maritime interest will render the security void on the ground of usury, not only as a charge upon the ship, but also against the person of the borrower. And where an instrument, called a bottomry bond, contained an express clause that the sum secured should be paid within thirty days after intelligence of the loss, Lord Stowell doubted his jurisdiction to entertain the suit at all, and dismissed it, on the ground that the very essence of bottomry, which alone could give jurisdiction to the Admiralty, was wanting. From this sentence an appeal was prosecuted to the Delegates, and that Court, after directing a search for precedents, decided that as the maritime interest was reserved, and maritime risk was excluded from the bond, it was void. 1 Hagg. 55; 2 Hagg. 57.

It is contended by the proctor for the libellants, that the hypothecation in this case, though bad in part, may by a Court of Admi-



rality be regarded as good in part, and as such, still be considered as a legitimate contract for the exercise of its jurisdiction. If by assuming this position, the proctor would maintain that the clause in the hypothecation by which the libellants refused to assume maritime risks, may be rejected by the Court, and the instrument be enforced as a valid hypothecation independently of this clause, he is widely mistaken. As the parties have chosen to bind themselves, so shall they be bound, and the Court has no authority whatever to vary the stipulations of their contract simply for the purpose of administering equitable relief, as a Court of Admiralty. It is perfectly true that a bottomry bond may be bad in part and good in part, and that as to the good, it is competent for a Court of Admiralty to exercise jurisdiction to grant relief. But I apprehend that this well recognized principle was never applied to a case like the present. It has sometimes happened that advances have been made for repairs in foreign ports, partly upon the personal credit of the owners, and partly upon the credit or security of the ship; and the whole amount of advances so made, has been included in one bottomry bond. In such cases, it has been uniformly held that as to the particular sum advanced on the personal credit of the owners, the bond was bad; but as to the sum advanced on the security of the vessel, it was good, and that as to the latter amount, a Court of Admiralty would exercise jurisdiction to enforce its payment. Such was the principle recognized by Lord Stowell in the case of the *Augusta*, 1 Dodson, 287. "It is quite clear," said the Court, "that the bill of exchange was founded on considerations of personal responsibility only, and that a bond of hypothecation was not at that time in the contemplation either of the borrower or lender. I have therefore no hesitation in saying that with respect to the £600, the bond is not effective; but with respect to the other part of the money, I am of a different opinion. For it is evident that no other security was held out than the ship and the freight, and it is therefore so far indisputably, a bottomry transaction. The foreign merchant, it is true, wished to extend the same species of security to the whole of his debt, and I see nothing dishonest or dishonorable in his attempt to do so; but, at the same time, this

Court cannot lend its assistance by enforcing the bond beyond the extent of its legal validity. It cannot permit the party to say the master had no other resource for procuring supplies except bottomry, when he himself had been content to advance the money on the personal responsibility of the owner. As far, then, as it relates to the £600, I think the bond is invalid ; but for the rest, I think it ought to be enforced. It is not necessary here, that a bond should be either good or bad, *in toto* : In the equitable proceedings of this Court, it may be good in part and bad in part." The case of the *Hero*, 2 Dodson, and that of the *Hunter*, Ware's Rep. 254, will be found to correspond with the one just cited, and the decisions of the courts are in strict conformity with the rules here laid down. It is true that in the case of the *Hunter*, Judge Ware held that although there was a fatal objection to the instrument as a bond securing marine interest, it was not perhaps quite certain that the creditor could have no remedy upon it in a Court of Admiralty for the principal sum advanced, with land interest. In that case, an amendment to the libel was allowed, and upon a new allegation that the libellant had a right to be paid upon general principles of the maritime law, the amount which it was shown had been originally advanced upon the personal credit of the owner, was decreed to be paid with land interest only.

Without undertaking to question the correctness of the course adopted by the learned Judge of the District Court of Maine, in giving a remedy *in rem* for a sum which he previously declared had been advanced upon the personal credit of the owners, it will be sufficient to show that the case now under consideration differs materially from that in which the amendment was allowed. In the latter case, there was the usual assumption of maritime risks, whereas the libellants here, as we have already seen, expressly refused to take any such risks. The claim of the lenders should have been made to depend upon the safe arrival of the vessel. This was necessary to justify the Court in granting them now a remedy *in rem*. It is perfectly true, as the proctor contends, that the very fact that advances had been made to defray the expenses of repairs, would create a lien upon the vessel, if such advances had been made

upon the credit of the vessel, and that such a lien would exist if there were no special act of hypothecation or mortgage. It would indeed exist by operation of law. But if instead of relying upon the general principles of the maritime law, the lender of the money chooses to exact of the master a special hypothecation of the vessel and cargo, and causes to be inserted in the instrument, clauses which operate as a waiver of his lien, or as a forfeiture of his right to proceed *in rem*, how can a Court of Admiralty grant him relief? If, as in the case now under consideration, he exacts *maritime* interest upon his loan, and at the same time expressly refused to assume *maritime risks*, is it not clear that the very instrument upon which he relies for his security is, by the well recognized principles of the maritime law, an abandonment of all claim against the vessel? It is well settled that if a material-man gives personal credit, even in the case of materials furnished to a foreign ship, he loses his lien so far as to exclude him from a suit *in rem*. (4 Wash. 458.) This rule is doubtless subject to the qualification that an express contract for a stipulated sum is not of itself a waiver of the lien, unless the contract contains some stipulations inconsistent with the continuance of the lien. (7 Peters, 324.) The drawing of the bill of exchange does not, in my judgment, help the case of the libellants. In the case of the *Augusta*, already referred to, Lord Stowell considered that the taking of a bill of exchange by the holder of a bottomry bond, was a strong circumstance to show that the advances were made on the personal credit of the owners, and not on the credit of the vessel, and he held the bond void for the amount of the bill, and good for the advances made after the bill was drawn. It is, however, the usual practice to draw bills of exchange; and there is no inconsistency in taking this collateral security, nor has it ever been held to exclude the bond, nor diminish its solidity. So it was distinctly held in the case of the *Jane*. (1 Dodson, 466.) But it is well settled, that when a bill is drawn, and a bottomry bond taken, with maritime interest, for the same sum, the bill must share the fate of the bond. Until the vessel arrives in safety at the end of the voyage, the loan is at the risk of the lender, and if she is lost, nothing is due upon the bill more than upon the bond. When

a bill is therefore drawn, and a bottomry bond given for the same consideration, the owner is not bound to honor the bill; at least not before the safe arrival of the vessel and the end of the risk. For it does not appear that anything will ever be due until the happening of the event on which the bond becomes payable, and then the payment of one security extinguishes both. (Ware's Rep. 252.)

It is further contended by the proctor of the libellants, that it is altogether premature, upon a trial of this exception to the jurisdiction, to regard the interest charged by the lender as usurious; that it is competent for the party upon the trial of the case upon its merits, to show that under the charge of *interest and commission*, there is no usury; that the interest is one thing and the commission another, and that there is nothing to prevent the Court from considering the one as separate and distinct from the other. When the question of jurisdiction was first presented to the consideration of the Court, I certainly did not understand the proctor to deny that maritime interest had been charged in the bill of exchange and the instrument of hypothecation, and I cannot upon an examination of that instrument, resist the conclusion that usury lurks under this apparently harmless name of *Commission*.

The aggregate amount borrowed by the master was \$813. This was loaned at the rate of what is specifically denominated 6 per cent. *commission*, and the advance and commission amount to \$862. For this, a draft is drawn, payable one day after sight, on the owner, residing in the City of Philadelphia. Here, then, is the sum of \$49 commission, charged upon a loan of \$813 for the space of perhaps ten days—allowing this time for the bill to be sent to the residence of the owner, from Key West. To use the expressive language of Lord Stowell, in the case of the *Gratitudine*, 3 Rob. Adm. R. 277, "I know that the word *commission* sounds sweet in a merchant's ear; but whether it is a proper charge or not on this occasion, I will not take upon myself to determine without a reference to the registrar properly assisted." I entertain but little doubt that maritime interest has been stipulated to be paid, and I have as little doubt that it is fully within my power, sitting in a Court of Admiralty, to

reduce the rate of interest, where it is manifestly exorbitant, that is to say, in a case coming within my jurisdiction. The power possessed will, however, be exercised with great care and caution. The *Zodiac*, 1 Hagg. 326.

But I do not pretend to assert the doctrine, that to justify this Court, as a Court of Admiralty, to exercise jurisdiction over a bottomry transaction, it is indispensably necessary that maritime interest should be charged. This would, in my judgment, be altogether unreasonable. The lender of money on a bottomry bond certainly has a right to relinquish a portion of the profits he would be entitled to realize; and the owner of a vessel would come with a bad grace to contest the validity of a bottomry security, upon the ground that the lender of the money had charged the master less than he was authorized to exact under the maritime law.

Conceding then, that, in the case before us, maritime interest was not demanded, and that the charges under the name of *commissions* will not amount to usury, can this Court, as a Court of Admiralty, exercise jurisdiction of the case, when it is perfectly apparent that no maritime risks were incurred? I am clearly of opinion that it cannot. In the language of Sir Stephen Lushington, in the case of the *Emancipation*, 1 W. Rob. 128, "I must look to the bond itself, without referring to extrinsic evidence at all; and, unless I can come to the conclusion, from the words of the bond, that any maritime risk is to be directly or indirectly inferred, I must hold that I have no authority to pronounce in favor of its validity." Again, that eminent civilian says, in the same opinion: "I am perfectly satisfied that whatever might have been the intention of the contracting parties to the bond, both upon the face of the bond itself, and according to legal inference, the payment of the money advanced does not depend upon the safe arrival of the ship. I must, therefore, pronounce against the bond."

Upon mature consideration, therefore, I am of opinion that, as the pleadings now stand, I have no jurisdiction of the case, and that the libel must be dismissed with costs.

*In the Supreme Court of Pennsylvania—Pittsburg, 1854.*GOCHENAUER'S ESTATE.<sup>1</sup>

1. The Orphans' Court and its auditors have jurisdiction of the disputed claim of a creditor against the estate of a decedent, whether the estate be solvent or insolvent.
2. Where the husband occupies the relation of trustee to his wife, and takes possession of her property in that capacity, such possession will not bar her right if she survive him.
3. Reduction, by a husband, of his wife's personal property into his possession—so as to change the ownership—is a question of intention to be inquired of upon all the circumstances.
4. Conversion is not reduction, but only evidence of it.
5. Clear proof that the husband received his wife's money as a loan, or a disclaimer of intention to make it his own property, will preserve her right of survivorship.
6. Alleged admissions to that effect by the husband must be scanned with great vigilance, to prevent the consequences of misapprehension.
7. Interest accruing during the husband's lifetime cannot be allowed, in the distribution of his estate, upon a sum of money belonging to his wife, that was in his hands, and which he might at any time have reduced into his own possession, when there was nothing to indicate that he was willing to pay interest for it.

This was an appeal from a decree of the Orphans' Court of Lancaster County, entered under the following circumstances :

Benjamin Gochenaur was appointed one of the administrators of the estate of his wife's father, Christian Newswanger, on the 28th day of March, 1846, and received at several times, as his wife's share, sums of money amounting in all to \$1786.

Gochenaur died on the 31st of December, 1851, and on the 19th of February, 1853, the administrators of his estate filed their account, showing a balance of \$5136 55, "for distribution among the heirs." To this account various exceptions were filed on behalf of the widow, Barbara Gochenaur, the seventh and last of which was in the following terms:—"The accountants have not paid the widow of the said deceased her share or portion, which, as adminis-

<sup>1</sup> We are obliged to James E. Gowen, Esq., for the report of this case.

trator of Christian Newswanger, deceased, he, Benjamin Gochenaur, deceased, received, but which he never paid to the said widow, amounting, principal and interest, to \$2079  $\frac{74}{100}$ ."

Upon motion of the attorney for the exceptant, the Court appointed D. G. Eshelman, Esq., auditor "to pass upon exceptions, and make distribution among those thereto entitled."

Before the auditor the counsel for the widow claimed the amount specified in the exception filed, upon the ground that the decedent, Gochenaur, had never reduced the sum received by him as his wife's share of the estate of Christian Newswanger, into possession, so as to become his own property, and that consequently it was a debt owing to her by the estate. The appellants, who were some of the heirs at law of Gochenaur, and distributees of his estate, alleged that the sum claimed by the widow had been converted to his own use by the husband.

The auditor having decided, upon the authority of a case in the Orphans' Court of Lancaster County,<sup>1</sup> that he had jurisdiction, and having heard the testimony upon the question of conversion, sustained the exception to the account, and awarded the widow the several sums received by her husband from the estate of her father,

<sup>1</sup> HEITLER'S ESTATE.—That was a case in which, upon a motion to have auditors appointed to examine the exceptions filed to the administration account of the estate of Richard R. Heitler, Esq., deceased, and to distribute the balance, Judge Long delivered the following opinion:

Previous to the Act of the 13th April, 1840, the law had been well settled by the Supreme Court, that an auditor had no authority to decide on the validity of a claim, in a solvent estate, in the Orphans' Court. By that Act it is made the duty of the Orphans' Court to appoint auditors for the purpose of distribution, "on the application of any creditor, as they were before authorized to do, on the application of the executor or administrator." And on the application of any legatee, heir, or other person interested in the distribution of the estate of any decedent, the Court is directed to "appoint one or more auditors to make distribution of such estate in the hands of any executors or administrators, to and among the persons entitled to the same." This Act, to a certain extent, has received a judicial construction in the Supreme Court, in the case of Kittera's Estate, 5 Harris, 417; and according to the view taken by them in that case, of the provisions of the Act of Assembly referred to, we are of opinion that the Orphans' Court have power to appoint auditors for the purposes indicated in the motion.



with interest calculated from a period immediately subsequent to the receipt of the last sum.

Exceptions, in which the question of jurisdiction was raised, were filed to the auditor's report, by the appellants, but the Orphans' Court, (Long, President,) after deducting from the amount awarded to the widow as a creditor of the estate, the interest computed during the lifetime of the husband, dismissed the exceptions and confirmed the report.

Upon the question of interest the opinion of the Orphans' Court was in the following terms :

"But we think the auditor erred in allowing her interest on that money during the lifetime of the testator. The money was received by him to accomplish a certain object, viz : for the purpose of paying his debts, and the auditor thought, as soon as that object was answered, he was liable for interest. When we take into consideration that the testator had the absolute control of this money, and might have converted it to his own use, we must not extend her rights beyond the agreement of the husband. Now, from the whole testimony, there is nothing to indicate that he was willing to pay interest for the money while in his possession, but the contrary we think is indicated by the testimony. Besides, courts have decided that where a wife permits a husband to receive the interest or profits of her estate, without any agreement to reimburse, he will not be required to respond to the wife for the same. *McGlensey's Appeal*, 14 S. & R. 64. The interest which, therefore, accrued in the lifetime of the testator, and which is charged against his estate, we direct to be struck out of the report, and with this modification the same is confirmed."

The errors assigned in the Supreme Court were—

1. The Court erred in taking jurisdiction of the claim of Mrs. Gochenaur. As an Orphans' Court, distributing a solvent estate, they possessed no such power.

2. The Court erred in allowing the said claim, or any part thereof.

3. The Court erred in allowing interest upon that claim.



The case was argued by

Messrs. *N. Ellmaker* and *J. E. Hiester*, for the appellants, who contended—

*As to the first assignment of error :*

That the Orphans' Court has no jurisdiction, excepting that conferred by the Acts of Assembly creating it.

*Metts' Appeal*, 1 Whart. 7, decided that in 1821 the Orphans' Court had no jurisdiction of an adversary claim against the solvent estate of a decedent. In *Warner's Estate*, 2 Whart. 295, the distinction between solvent and insolvent estates was stricken away, and the jurisdiction denied in either case.

Was jurisdiction conferred by the Act of 1832, or its supplements?

The 4th section of the Act of 1832, extends the jurisdiction, *inter alia*, to the distribution of the assets of decedents, after the settlement of administration accounts, among creditors and others interested; and the 19th section provides for the appointment of auditors, upon the application of the executor or administrator, to make distribution among creditors, *whenever there shall not be sufficient assets to pay all debts*.

The first clause of the 1st section of the Act of 1840, authorizes a *creditor* to apply for the appointment of auditors in the same cases that an executor or administrator could by the 19th section of the Act of 1832. The second clause of the same section directs the Court, upon the application of any legatee, or other person interested in the distribution, to appoint auditors to make distribution among those entitled. The first clause authorizes, by *express words*, the interference of creditors in insolvent estates only, as under the 19th section of the Act of 1832. The second clause might, perhaps, be tortured to include creditors *by inference*. But can jurisdiction be acquired by inference? But is there a fair inference to that effect? The use of the word *creditors* in the first clause, and its omission in the second, shows an intent not to include creditors in the latter. If such were not the case, the first clause is superfluous. The object of the second clause was to provide for the distribution of *solvent estates* among the distributees, after the payment of debts, a matter omitted in prior acts. *Kittera's Estate*,

5 Harris, 416, does not conflict with this view. There the estate was largely insolvent. The judge who delivered the opinion of the Court, construed the acts, as strongly as possible, in favor of the right of creditors to interfere *in all estates*, but the distinction between solvent and insolvent estates did not arise. The Orphans' Court has no jurisdiction of a disputed claim against a solvent estate. *Latimer's Estate*, 2 Ash. 520.

*As to the second assignment :*

It is clear, from the testimony, that Gochenaur had converted the money received from Newswanger's estate to his own use, without any agreement with his wife or any one that she should be repaid. His estate was increased by it, of which she reaps the benefit, as his widow. Loose declarations on his part, or a mere intention to give, create no liability. When he afterwards had the means to repay her, he never recognized her right to require it. *Fisher's Guardian vs. Husband*, S. C., May, 1848, (not reported;) *Housel vs. Housel*, 1 Wh. Dig. 925, pl. 531; *Clevenstine's Appeal*, 3 Harris, 496, and 5 Vesey, Jr., 71, were recited.

*As to the third assignment :*

Interest was never thought of by Gochenaur and his wife; and it is well settled that where interest is not part of the contract, it is not demandable until a demand be made, which was not done in this case until the exception to the account was filed in 1853.

*A. Herr Smith, Esq.*, for the appellee,

*As to the first assignment of error*, cited Act of April 13, 1840, Sec. 1, Bright. Purd. p. 211, the opinion of Lewis, J., in *Kittera's Estate*, 5 Harris, p. 422; and the opinion of Black, C. J., in *Whiteside vs. Whiteside*, 8 Harris, 474.

*As to the second assignment of error :*

The question was one of law and fact. As to the facts, the auditor was correct in his finding. His opinion of the law was equally correct, and is supported by the authorities cited by him and by the cases of *Baker vs. Hall*, 12 Ves. 497, and *Gray's Estate*, 1 Barr, 329.

*As to the third assignment :*

Interest was allowed from the death of the husband. If the

appellee is entitled to the principal, it was a debt payable at the death of the husband, and must bear interest.

The opinion of the Court was delivered by

WOODWARD, J.—Under the terms of the Acts of Assembly relating to the jurisdiction and powers of the Orphans' Courts, and the opinion of this Court in *Kittera's Estate*, 5 Harris, 422, it is not to be doubted that the Orphans' Court of Lancaster had jurisdiction of the widow's claim in this case. The second and more important question is, whether, under the circumstances in proof before the auditor, the money claimed was so reduced into possession by the husband as to become his property. If it was, the widow has no title to it; if it was not, her right survived, and may be asserted in the Orphans' Court. The money came into his hands as administrator of Christian Newswanger, of whom Barbara was a daughter and heir; and to her Gochenaur stood in the double relation of husband and trustee.

In *Baker vs. Hall*, 12 Vesey, 497, where an executor entered into possession of the real and personal estates of the testator, married one of the residuary devisees under the will, and died leaving her surviving him, it was held by Sir William Grant, Master of the Rolls, that the husband must be considered to have entered into possession as trustee and executor of the will only, and not as husband; and therefore his wife's share of the residue could not be deemed sufficiently reduced into possession so as to prevent its surviving to her upon his decease. And in *Wall vs. Tomlinson*, 16 Vesey, 413, it was said that the transfer of stock to a husband, merely as trustee, cannot be regarded as a reduction into possession that will entitle his representatives. It was made *diverso intuitu*. If the husband takes possession, says Ch. Kent, 2d Com. 138, in the character of trustee, and not of husband, it is not such a possession as will bar the right of the wife if she survive him. The property must come under the actual control and possession of the husband, *quasi* husband, or the wife will take as survivor instead of the personal representative of the husband.

This distinction has been fully adopted in Pennsylvania, and a series of well considered cases, carrying out the principle to its logical result, has established that reduction into possession, so as to work a change of ownership, is a question of intention, to be inquired of upon all the circumstances. Conversion is not reduction into possession, but only evidence of it; and therefore conversion may be explained by other evidence, negating the intention to reduce to possession in such manner as to transfer the title. According to these cases, marriage is treated as only a conditional gift of the wife's choses in action—or, to speak more accurately, a gift to the husband of her power to dispose of them to himself, or any one else, by force of the dominion to which he has succeeded as the representative of her person;—and because the gift is conditional, he has a right to reject it by refusing to perform the condition. The law does not cast it from him beyond his power of resistance, for every gift requires the assent of the donee, and hence clear proof that a husband received his wife's money as a loan, or a disclaimer of intention to make it his own property, proved by his admissions, will preserve her right of survivorship. *Siter's case*, 4 Rawle, 478; *Hess' Appeal*, 1 Watts, 255; *Hinds' Estate*, 5 Whart. 138; *Timbers vs. Katz*, 6 W. & S. 290; *Gray's Estate*, 1 Barr, 329; *Woelper's Appeal*, 2 Barr, 71.

It is said in *Gray's case*, that such admissions as a medium of proof are to be scanned with extreme vigilance; and to prevent the consequences of misapprehension or mistake on the part of witnesses, it is necessary that they be deliberate, precise, clear, and consistent with each other; not inconsiderate, vague, or discrepant;—a rule founded in the experienced uncertainties of parol proof, and most necessary to be continually applied. Beside the implications from the fiduciary character of Gochenaur, we have in this case his declarations and admissions, made, not in casual conversations after receipt and conversion of the money, but in the very act of receiving it, and which seem to answer all the conditions of the above rule. Thus Barr, who saw him receive \$415 of the money in 1850, swears that he declared at the time, "it is my wife, Barbara's, and it is to be her's." And Ann Newswanger, speaking of the money he got

from the notes and articles bought at the vendue, amounting to \$700, reports him as saying "he would take this money and pay his debts on which he was paying interest, but that it was Barbara's money and should be her's." Anna Kline thinks she was present three times when Gochenaur got money, and every time she heard him say it was his wife's and should be her's. She saw him count the \$700; he said "it was his wife, Barbara's—he owed it and was going to pay it out—he ought'nt almost to take it to pay his debts." It cannot be doubted that such declarations imported an intention to convert the money to his own use as his wife's money and not his own;—that is, they explain the act of conversion consistently with his intention that it should survive to her, and not be so reduced into his possession as to extinguish her right.

The credibility of the witnesses was for the auditor, and we cannot rejudge his judgment on this point. Taking their testimony as true, we think the auditor and the Court were right, in view of it and of the fiduciary relation of Gochenaur to the fund, in decreeing the money to Barbara. The Court were clearly right in reversing the auditor on the question of interest, and of this the appellant has no reason to complain.

The decree is affirmed.

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*Louisville Chancery Court, Kentucky—May 11th, 1855.*

VANDERPOOL vs. THE STEAMBOAT CRYSTAL PALACE.

1. Responsibility of owners of steamboats for thefts committed on them.
2. The boat will be liable, when it is furnished with state rooms and locks to the doors, if a watch, breastpin, pocket money, and such like, should be stolen from the room in the night-time, without breaking. This is the general rule. There are exceptions.
3. Where such is the structure of the berths, the officers of the boat must know whether the locks are in order or not; and if not, they must look to the protection of such property of the passenger, as before mentioned. It is not the duty of

the passenger, in such case, as a general rule, to take such articles to the clerk, or other officer, for safe keeping. They are part of his personal apparel, and the inconvenience would be too great.

The opinion of the Court was delivered by

PIRTLE, Chancellor.—The complainant was a passenger on the steamboat Crystal Palace from Paducah to Louisville, and on the night of her arrival at Louisville, a thief entered the state room where he was sleeping and stole from him his gold watch and chain, a diamond breastpin and a sum of money; and to make the boat liable for his loss, this attachment was sued out of chancery.

The boat was constructed in the modern style, with separate rooms for passengers, and locks to the doors. It is proved that the lock to the door of the room in which the plaintiff slept was in some way out of order, so that it would not fasten. This had been found out by him the night before the felony, and it was mentioned by the plaintiff and his brother, who staid in the same room with him, to the waiters about the cabin; and when one was called as the plaintiff was about to retire, to see if the door could not be secured in some way, he said there was no way of fastening it but by putting a chair or baggage against it, which was done.

The common law does not fix a rule directly applicable to just such a case as this. When it was formed there were no steamboats, and the world had seen no such internal navigation as bears our ten hundreds of thousands of people in crystal palaces on our majestic rivers. But all civilization has held public carriers by water to a responsibility more or less strict, according to the necessity demanding it. By the Roman law, (which is still the rule over the larger part of the Christian world,) ship masters, as well as innkeepers and stable keepers, were put under a peculiar responsibility, and made liable for all losses not arising from inevitable casualty or overwhelming force. The common law went further as to the ship master, who was a common carrier, and made him liable for every loss, unless it was by the act of God or the enemies of the King. But these rules, both of the civil and the common law, applied only to the property of the passenger or traveler which was put into the

custody of the ship master, &c. They did not apply to such articles as the passenger kept about his person, or in his own charge. The rule at inns was different where the goods were stolen from the apartments assigned to the guest.

By one of the most enlightened codes that any civilization has seen, (although compiled in 1263,) it was provided "that everything which travelers, either by sea or land, put into inns or taverns, or ships that navigate the sea or rivers, to the knowledge of the owners thereof, or of those who act in their places, shall be taken care of, so that no loss or damage happen to them: and if they get lost through their neglect, or fraud, or fault; or if they be stolen by any persons who come with the travelers, then such owners shall be bound to pay for everything that is lost or damaged; for it is but just that since travelers confide to them their persons and effects, they should honestly and faithfully take care of them, so that they sustain neither loss nor damage. And what we say in this law, is understood of hotel and innkeepers, and of owners of vessels who are in the habit of publicly receiving persons for hire or for a price." 2 *Moreau & Carleton's Partidas*, Partida 5, tit. 8, l. 26. This looks very much as though it would include a loss of property in the charge of the person of the traveler, as well as that handed over to the care of the master of the vessel, or of the innkeeper; indeed, it seems to put the master of the vessel under the same responsibility laid on the innkeeper. This law originated with a country then much more commercial (Spain had splendid ships at that time) and much better enlightened, than that from which the common law has come was at the same date.

The liability of ship masters, innkeepers, &c., under these different codes, always had reference to necessity of intercourse, the protection and accommodation openly offered the traveler, and the danger there was of the acts of the parties, of servants and others employed by the carriers, or innkeepers, &c., or of strangers who might combine with them. In this country, where we have a necessity of intercourse, a traveling beyond anything seen in any other age, or now in any other country, we have also a better accommodation and protection offered by steamboats than are to be found in



any other part of the world. The law of bailments involved in these things, must advance with them. The law of the caravels in former times about the coasts of the old world, or of such open ships as Columbus procured to find another hemisphere, must have been different, when they had been engaged in the unsublime pursuit of carrying passengers for hire, from that of the splendid palaces that float so invitingly on the American rivers. Here is the parlor, and here is the secure state room offered, with its door to be shut and locked with its inside key.

I can recollect when the passenger steamboat was first built on our rivers. It had no door then to protect the berths or sleeping places. They had only the benefit of drapery, except rooms for ladies. Then, of course, the passenger could not expect, when he stepped in haste on this fast traveler, that he could sleep secure from thieves, if any were about, with his watch and breastpin and money near him; and the boat should not then have been liable for what was not specially put in the care of its officers, any more than for a picking of a pocket by a stranger on one of its decks; no more than an innkeeper should be liable for such an act in the public entrance hall. But when the steamboat is so furnished as to offer the passenger the protection of lock and key, he has a right to expect it, and go on board, as he often does in this country, with a haste that would not allow him to inquire whether all is in fit order or not; and in such instances, if he takes his watch and breastpin, and such like articles to his room, or a reasonable sum of money, when he goes to bed, and they are stolen, the boat should be held liable. I would not hold the owner of the boat as an innkeeper is liable at the common law for an interior breaking and robbery, but only as, I think, the civil law would have held him, in analogy to its law of innkeepers, for a failure to carry the party and his effects under his charge, or about his person, with the carefulness substantially offered to every traveler from the structure of the boat.

But it may be contended that if the passenger finds out that the lock of his door is out of order, he should undergo the risk, or take such articles of value as have been about his person to some officer



of the boat for better care. I do not think so, as a general rule. The boat's owner has engaged his safety; and if a lock is out of order, the officers of the boat ought to know it, and have it put in order, or take other means, such as setting a watch or guard, or at any rate offer to take charge and care themselves of the property exposed. Circumstances might change the course to be taken, but none are shown here. It seems to me that unless such a rule be established, passengers will be subjected to the depredations of servants, or others, who may withdraw keys, seeking the chance of carelessness, or too much confidence on the part of the traveler.

It is proved by one witness that there was a printed card posted up in the state rooms requesting passengers to lock their doors, and place any valuables which they might have, in the hands of the clerk for safe keeping, otherwise the boat would not be responsible for such articles. It is not shown, however, that the plaintiff had seen the notice, if there was one in his room. But it could not be supposed that this notice meant that every passenger should deliver his watch, breastpin and pocket money every night to the clerk; for it would be an inconvenience unheard of: these are a part of his apparel, and he might be subjected to disputes about their identity every morning; but it had reference to "valuables," not to be kept with the door locked—nothing ordinarily belonging to his dress, or carried about his person. The notice, I think, did not excuse the boat from the loss which happened, because the door could not be fastened. The engagement implied was to have the lock in order, or stand responsible for the robbery. Another rule would be unsafe to the great traveling public in this country. I do not say this implication exists in all instances where the berths are finished with doors to be locked; but I do not think the rule qualified by anything in this case. Wherefore it is decreed that the defendants pay the plaintiff \$560, and the costs of this suit; and unless they shall do so in fifteen days, the Court will make such order against the surety as may be proper to enforce the same.

*Bullitt & Smith*, for plaintiff. *Barret & Wood*, for defendant.

*Superior Court of Cincinnati.*AUGUSTUS ISHAM vs. THOMAS GREENHAM.<sup>1</sup>

1. A common carrier, or other bailee for the transportation of property, must permit the consignee, if he requests it, to examine the cargo at the place of delivery, before he can demand his freight.
2. The duties of the carrier, and consignee, are correlative: the one to deliver, and the other to pay the freight; both are mutual acts. -
3. Where the carrier demands a larger sum than that which is stipulated by contract, and refuses to deliver the property at the place of its destination until such additional sum is paid, he may be sued in tort for the conversion.
4. Where the carrier refuses to receive any sum less than the whole amount he thus claims, and the consignee offers to pay the sum stipulated in the contract, no formal tender of that sum is required from the consignee: the law in such a case will not ask him to do a vain thing.

On the trial, the plaintiff proved that his correspondent in Toledo, Ohio, in September last, shipped on the canal boat St. Mary's, of which the defendant was master, thirty tons of ice, to be carried to Cincinnati, and delivered to plaintiff without delay; the stipulated freight being eighty dollars, and the canal tolls in addition. The defendant signed a bill of lading, embodying the contract as proved.

On the arrival of the boat at Cincinnati, the plaintiff called upon the defendant and expressed his readiness to receive the ice, stating at the same time, as the weather was very hot, it was necessary to land the cargo, and place it immediately under cover, the ice-house of the plaintiff being but a short distance from the place of landing, and preparations were immediately made for that purpose. To this application the defendant returned for answer, that he would not permit the ice to leave the boat, until not only the sum agreed upon for freight and tolls was first paid, but twenty-five dollars in addition, for a claim which he asserted for damages said to have

<sup>1</sup> We are indebted to the Messrs. Handy for this case, which will be found in Handy's Rep., v. 1, p. 857.

been sustained somewhere upon the passage from Toledo, by the detention of the boat. This additional sum the plaintiff refused to pay, but proffered to pay the amount stated in the bill of lading; this was in return refused by the defendant, who declining to deliver the cargo, except upon the terms he prescribed, the plaintiff commenced this action and obtained an order for the delivery of the ice.

The case was submitted to the Court by the consent of the parties, and after a full hearing, judgment was rendered for the plaintiff.

The opinion of the Court was delivered by

STORER, J.—The defendant asks for a new trial, on the ground that his lien for freight gave the right to retain the property until the amount was paid, or tendered, by the plaintiff; and though there was an offer to pay the freight, there was no exhibition of the money to the defendant at the time the offer was made, and the defendant, therefore, might well refuse to deliver, until he was satisfied of the plaintiff's ability to pay, should the tender have been accepted.

The plaintiff, on the other hand, insists that the defendant had no lien but for the freight agreed to be paid, and the assertion of a lien beyond that sum was an unlawful assumption of authority over the property, which, when coupled with the refusal to deliver, except upon his own terms, was equivalent to a conversion in law; that the defendant having placed himself in this position, waived a formal tender of the real amount due, and could not require it to be made.

It is very clear, that unless there is a stipulation for the payment of freight at some other place, and at some other time, than the point of delivery, the carrier has a lien upon the cargo for his freight, and cannot be compelled to release it, except by the payment or tender of the amount.

The stipulation in the bill of lading, that the property shall be delivered to a consignee, on the payment of freight, creates a cor-

relative duty on the part of the carrier and the consignee, the one to deliver, the other to pay. Neither are compelled to perform their part of the agreement, unless both are willing and ready to act in good faith. As the obligation to perform is mutual, neither can avoid the duty imposed upon each, and claim at the same time the protection of the law. There can be no advantage gained by retaining the cargo on board the vessel, or refusing to break bulk that the condition of the cargo may be known, for the consignee is clearly entitled to examine it, and ascertain whether it is in such order as he will accept it or not; and where the carrier obstinately refuses to land the cargo, or to store it, still retaining his lien for the freight, he ought not to expect that his conduct will be regarded with a favorable eye, should the question be subsequently litigated.

“Where there are mutual acts to be performed by contracting parties at the same time, neither party is bound to do the first act, but each is bound to perform his own; and he who is able and ready, has a right of action against him who is not.” *Hammond vs. Gilman*, 14 Conn. 479. In *Tate vs. Meek*, 8 Taunton, 280, Chief Justice Gibbs decides the precise point. See also, *Yates vs. Railston*, 8 Taunton, 302, and *Christie vs. Lewis*, 2 B. & Beattie, 410.

Without disputing the carrier's lien in the present case for his whole freight, it cannot be claimed that he could assert it for any other amount than that stated in the bill of lading.

There can be no lien for unliquidated damages, nor for any breach of covenant to furnish a full cargo, nor for demurrage, nor for pilotage or port charges. As the contract of affreightment is the only basis of the lien, it is never extended to embrace any other claim than that stipulated to be paid for the carriage of the goods; all else must be matter of special agreement.

In *Bailey vs. Gladstone*, 3 M. & S. 205, the Court of King's Bench held, that the “owner could not detain the goods for dead freight or demurrage,” and a bill being afterwards filed in equity, to set up the lien, Sir William Grant, Master of the Rolls, dismissed it. *Gladstone vs. Bailey*, 2 Merrivale 401; see also,

*Philips vs. Rodie*, 15 East, 547 ; *Jones vs. Tarleton*, 9 Mees. & Wells. 657.

If there was no lien, that the defendant could set up for his damages, what was the effect of including such a claim in his demand for freight, and refusing to deliver the cargo until the whole amount was paid ?

On general principles, whenever the act of one party, to whom another is bound to tender money, services, or goods, indicates clearly that the tender, if made, would not be accepted, the other party is excused from the technical performance of his agreement. The law never requires a vain thing to be done.

So when the creditor declared he would not receive the money, if tendered, it was held that the debtor need not make the tender ; 2 Wash. C. C. R. 143. And in that large class of cases where the vendor contracts to deliver a chattel at a given time and place, and the conduct of the vendee is evasive and inconsistent, implying bad faith, it will be for the Court to decide, sitting as they did in this case, as a jury, whether a formal tender should be required or not. It ought not to be required that a strict rule should be applied to one party, where the other had shown himself not only careless of his obligation, but had rendered a strict compliance unnecessary. *Gilmore vs. Holt*, 4 Pick. 258 ; *Borden vs. Borden*, 5 Mass. 74.

It would have been useless, then, for the plaintiff to have tendered the amount due as freight, when he had already been told it would not be accepted. The claim asserted by the defendant was illegal, and having refused to deliver the cargo, unless that claim was paid, the plaintiff had nothing to do but to regard the carrier's acts as unlawful, and hold him responsible for the value of the property in tort.

In *Blair vs. Jeffries*, Dud. S. C. R. 59, it is held that if the carrier refuses to deliver the goods for any other cause than the non-payment of freight, he cannot avail himself of the want of a tender of the freight. See also, *Angell on Carriers*, § 346.

This ruling is the result to which the analogous cases conduct us. Where one party, having a just claim, destroys it by adding that for which there is no authority in law, and no agreement of his co-

contractors; and when the effect is to assume a control over property not authorized by the relation of creditor and debtor under the agreement, it is a direct appropriation, to the use of the carrier, and he must answer for his unauthorized act to the owner of the goods. The remedy may be trover or replevin, at his option, as the evidence will sustain either form of action.

This view of the case disposes of the points taken by the defendant's counsel, as to the necessity of an actual tender, and the many cases quoted in the argument, can have no application to the case.

We hold, under the circumstances, that no tender was necessary; and if there had been, it was waived, and rendered unnecessary by the conduct of the defendant.

The motion for a new trial must be overruled.

*A. S. Sullivan*, for plaintiff. *Todd*, for defendant.

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### RECENT ENGLISH DECISION.

#### GURNEY AND OTHERS vs. WOMERSLEY AND OTHERS.<sup>1</sup>

1. The vendor of a bill of exchange, though not a party to the bill, is responsible for the genuineness of the instrument; and if the name of one of the parties is a forgery, and the bill becomes valueless, the vendee is entitled to recover the price.
2. The defendants, who were bill brokers, having received from A. a bill of exchange drawn and endorsed by him, for the purpose of being discounted took it to the plaintiffs, who were money lenders, with whom the defendants had previously had dealing: they declined to endorse or guarantee it, and the plaintiffs, upon the credit of the acceptance, discounted it. There were separate notes between A. and the defendants, and the defendants and the plaintiffs; and the rate of discount charged by the defendants to A. was higher than that charged by the plaintiffs to the defendants. The acceptance was forged by A., and the bill was valueless. *Held*, that the defendants having been found by the jury to have dealt with the bill as principals, the plaintiffs were entitled to recover the sum paid to the defendants upon the discount of the bill.

<sup>1</sup> 19 Jurist, 828. Court of Queen's Bench.

*Nov. 4, 1854.*—Action for money had and received. Plea, never indebted. On the trial, before Lord Campbell, C. J., at the Sittings at Guildhall after Trinity Term, 1854, it appeared that the plaintiffs, who were money lenders, and the defendants, who were bill brokers or discount agents, had extensive dealings together, in the course of which the plaintiffs had frequently discounted bills for the defendants, which were drawn and endorsed in the name of Anderson. Some of these bills the defendants endorsed or guaranteed, and others were discounted without such endorsement or guaranty. On the occasion of one of the bills, endorsed by Anderson, which was for £3000, and purported to be accepted by Van Notten & Co., being brought to the plaintiffs for discount, the defendants were asked by the plaintiffs to endorse or guarantee it, but they declined, and the plaintiffs discounted it, without such endorsement or guaranty, upon the faith of the acceptance of Van Notten & Co. This acceptance turned out to have been forged by Anderson, who became bankrupt, and was subsequently convicted of the offence. The only genuine name upon the bill was that of Anderson, and the bill proved worthless. The mode of dealing was, that separate notes passed between the plaintiffs and the defendants, and between the defendants and Anderson, and a different rate of discount was charged, the plaintiffs charging the defendants £5 per cent., and the defendants charging Anderson £6 per cent. for discount, and 10s. per cent. agency commission. The Lord Chief Justice left to the jury the question whether the defendants had dealt with the bill as principals, or only as agents for Anderson, and directed them that in the former case the defendants were liable to refund the amount received on the discount of the bill, as upon a failure of consideration. The jury found a verdict for the plaintiffs for £3000. In the following Michaelmas Term, (Nov. 4),

*Bramwell* moved for a rule nisi for a new trial, on the grounds of misdirection and of the verdict being against the evidence.

COLERIDGE, J.—I am of opinion that there should be no rule on either ground.

As to the verdict being against the evidence, the distinction pointed out between the dealings with the bills endorsed or guaran-

teed by the defendants and those which they did not endorse or guarantee, has reference to the solvency of the parties, and not to the genuineness of the instrument. There was clearly enough evidence to show that the defendants meant to make themselves liable as principals in this transaction.

The alleged misdirection raises the question as to the extent of responsibility which in such transactions the vendor of a bill takes upon himself. This case seems to me to fall within the same principle as the case of a bar of brass sold as a bar of gold, which was put by Lord Campbell, C. J., in *Gompertz vs. Bartlett*, (2 El. & Bl. 847, 854; 18 Jur. 266, 267), and the other cases there cited. When a person asks another, "Will you discount this bill?" which appears on the face of it to be drawn, accepted, and endorsed by certain persons, he represents it to be a bill drawn, accepted, and endorsed by those persons; and if it is not, the consideration fails.

WIGHTMAN, J.—As to the first point, it appears to me that there was quite enough evidence to warrant the jury in coming to the conclusion that the defendants acted as principals in the transaction.

As to the alleged misdirection, it is said that the plaintiffs had all that the defendants purported to sell, and that there was no guaranty. But it seems to me that there was a guaranty that the bill which the defendants professed to sell was a genuine instrument. I cannot distinguish this case from the case of the sale of the Guatemala bonds, (*Young vs. Cole*, 3 Bing. N. C. 724,) and the Navy bills, (5 Taunt. 488.) Much depends upon the terms and the language used at the time of the transaction. In this case the bill proves to be very different from the bill which the defendants professed to sell; and therefore there was a failure of consideration.

My brother Erle, who has gone to chambers, authorized me to say that he is of the same opinion on both points.

Lord CAMPBELL, C. J.—First, where a person employs a broker to discount a bill, and the bill broker goes to a capitalist or money dealer and procures him to discount it, the transaction is between



the bill broker and the money lender, not between the owner of the bill and the money lender. The contracts are separate. There is one contract between the bill broker and money lender, and another contract between the bill broker and the owner of the bill, and there are distinct rates of discount. The defendants dealt as principals, and are responsible for the genuineness of the bill.

Secondly, though the defendants, having declined to endorse and guarantee the bill, are not liable for the solvency of the parties to the bill, they are liable for the genuineness of the instrument, and for its being what it purported to be. Here, that which purported to be an acceptance of Van Notten & Co., on the credit of which the defendants asked that the bill should be discounted, was a forgery, and the bill was of no value. Therefore there was a failure of consideration, and the plaintiffs are entitled to recover in this action.

Rule refused.

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## LEGAL MISCELLANY.

### LEGAL PRINCIPLES.

#### No. VI.

We read in our law books, as in our Latin grammars, of rules and their exceptions. Now we may possibly make a distinction between a rule and a principle of the law; but if we do, and consider rules as specific developments of principles, we shall find our rules of little service, because we shall be obliged constantly to look back to the developing principle to learn their extent and force. And such rules must always be encumbered with exceptions so numerous and difficult to be understood, that we may well doubt the propriety of ever recognizing their existence in the law.

But most clearly a legal principle is not ordinarily a thing with exceptions. Usually, like a principle of natural law, it works uniformly and harmoniously. Yet every legal question is not influenced by every legal principle, just as the falling of a feather in an

exhausted receiver is in no way affected by the resistance of the atmosphere. The principle must be applicable to the case, or it is not to be applied.

Now, when one proposes what he calls a legal principle, and attaches to it exceptions; or when we see that his supposed principle requires exceptions; we at once doubt its correctness. It is stated in terms too broad, or too narrow; or it is some single development of a principle, instead of being the principle itself; or it is in part or in full a mere interloper, having no real existence in the law. In this view, we do not embrace all possible circumstances, and say that there is absolutely no such thing as a legal principle which has an exception; and it is probable that such an assertion would be too broad. A legislative enactment may lay down a proposition with an exception; also the courts may establish a technical rule, in the nature of a legal principle, and attach to it an exception. And so, in other particulars, the common law may have been moulded into forms so unscientific as to develope exceptions.

One thing, at least, is quite certain, that he who studies most accurately and deeply our noble system of jurisprudence, will find in it fewest exceptions. And generally, if not universally, when a true legal principle is correctly stated, it will be seen to operate fully wherever, in its terms, it is applicable. A particular case may be governed by it alone, or by it and one or a dozen other legal principles combined. That is, each case, in law, is governed by all the legal principles which are applicable to it, exerting severally and together their full influence. And as we read in the books of natural science, that the centripetal and centrifugal forces, yoked together, draw the earth round its orbit, while neither of them, separately, would take it in the same direction; so likewise, it is often in the law. The combined action of legal principles upon a case, may work out a result to which no one principle alone would conduct; but this does not establish an exception.

It follows, therefore, that a man, to be a sound lawyer, must be familiar with all the principles of the law. If a part only are within the compass of his knowledge, he may correctly decide upon their application to a question before him, and yet decide wrongly in

the case, by reason of not taking into the account the influence of other principles, concerning which, being ignorant of their existence, he could make no calculation.

Some men have minds so constituted by nature, that they are wholly unable to see the force, or even the existence, of any single legal principle, much less to understand the combined action of many. Such men are out of place in the profession of the law, though they may have high capacity for some other calling. But other men who discern principles clearly, and reason well upon them, commit errors, as we have just intimated, from not having learned all the principles, or, what is equally common, from a failure to call some of them up when wanted. Now, these persons are usually very confident of their conclusions; they feel, in fact, certain; until age and experience have taught them the use of caution. And here we see how modesty enlarges with true knowledge. Standing on a little point of some bay in the ocean of truth, far inland, the untaught aspirant for the fore-castle pictures not to his vision the mighty billows and waters, apparently enclosed by no land, that roll beyond.

Whatever view we take of the subject discussed in this series of articles, it lifts itself, in importance, above almost all other subjects connected with legal science. And all persons must admit that it is too little understood. He who has thoroughly mastered the elementary principles of the law, will readily learn the rest from his text books and digests, as cases arise in practice; while he who understands not the principles, will stumble at every step, whatever other legal knowledge he may possess.

J. P. B.

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## ABSTRACTS OF ENGLISH DECISIONS.

*Action—Malicious Prosecution.*—An action for falsely and maliciously procuring the plaintiff to be adjudged a bankrupt, may be maintained, though the affidavit before the Commissioner of Bankruptcy did not show an act of bankruptcy, and the Commissioner made a mistake in point of law in

adjudging plaintiff to be a bankrupt. *Farlie vs. Banks*, 19 Jurist, 331, Queen's Bench.

*Admiralty—Foreign Law—Shipping, Lien of Master.*—The adoption of the law of a foreign country, as in the case of a law giving the master a lien for his wages, is discretionary with a Court of Admiralty, and not to be resorted to where it would operate with injustice. *The Johannes Christoph*, 19 Jurist, 192. Court of Admiralty.

*Common Carrier—Carrier's Act.*—The enactment in the Carrier's Act of 11 Geo. 4, and 1 Will. 4, c. 68, that no common carrier by land, for hire, shall be liable for the "loss" of certain descriptions of articles above the value of £10, unless delivered as such, and an increased charge for carriage paid or accepted, must be understood with reference to a loss of the article "by the carrier;" such as by the abstraction by a stranger or by his own servants, not amounting to a felonious act, or by the carrier or his servants losing them from vehicles in the course of carriage, or by mislaying them, so that it was not known where to find them when they ought to be delivered, &c., and does not extend to every loss of any description whatever, occasioned "to the owner" of the article by the non-delivery, or by the delay of the delivery of it, by the neglect of the carrier or his servants. Quære, whether the loss spoken of in this section must be a permanent or may be only a temporary loss. *Hearn vs. The London and S. W. R. R. Co.*, 19 Jurist, 287. Exchequer.

*Poor—Justice—Apprentice.*—The assent by justices to the binding of a child, under the 43 Elizabeth, is a judicial act, and must therefore show on its face, that the justices were at the time acting within the local limits of their jurisdiction. Where, consequently, the justices in their assent described themselves as justices "for the county." *Held*, that the assent was bad, and no settlement gained under the indenture. *Overseers of Staverton vs. Overseers of Ashburton*, 19 Jur. 233. Queen's Bench.

*Powers.*—Where a general power to appoint had been exercised as to a portion of the fund subject to it, but not as to the other part, and the deed exercising the appointment reserved a power of revocation and new appointment over the portion of the fund appointed, it was held that general words in a subsequent deed of appointment executed by the same appointor, purporting to exercise all powers of appointment given or limited to him, or under or by virtue of which he had power to appoint, did not operate as an exercise of the power of revocation of the appointment of the portion

of the fund already appointed, but only of the power to appoint the portion still remaining unappointed. *Pomfret vs. Perring*, 19 Jur. 173. Court of Appeal in Chancery.

*Power—Revocation and New Appointment.*—By law, a power which, in any mode and to any extent, has been exercised revocably, and the revocable appointment made under which has been revoked, without being operated upon, is generally, if not universally, of the same force, and exercisable in the same manner, as if the revoked appointment had not existed; and a power cannot be necessarily exhausted by a revocable act, although exercising otherwise the power to the utmost, more than by a conditional act, or by an act of merely partial execution—i. e. of execution in no-sense and in no possibility full and complete. *Evans vs. Saunders*, 19 Jur. 265. Court of Appeal in Chancery.

A power to appoint by deed or will does not constitute two separate and distinct powers, but is a single power, with a restriction on its exercise, requiring it to be exercised by one or other of those two instruments, but leaving to the donee the option, within the limits of that restriction, to choose which instrument he will use in exercising the power. *Id.*

Where, by the terms of the reservation of powers of revocation and new appointment, the donee is authorized to exercise them, at his option, either by the same or by different deeds, if he first exercises by deed the power of revocation, the power of new appointment continues to subsist as a valid operative power, capable of being exercised by a subsequent deed; and admitting that it is as competent to the donee of such powers, exercising only the power of revocation, to release, extinguish, or destroy the power of appointment which was reserved to him, yet the mere exercise of the power of revocation as above will not *per se* have any such effect. *Id.*

Where a person has a general power of appointment by deed, whether it is a primary power, (i. e. a power preceding the uses declared in default of appointment,) or be a power of appointment connected with a power of revocation, and following the uses declared by the instrument creating the power, and exercises that power of appointment, and by the deed exercising that power reserves to himself a new power of appointment, whether such new power be reserved as a primary power, or as connected with a power of revocation, such power so reserved is, to all intents and purposes, a new power, newly created by him, and is not the old power which he has exercised; and it is equally a new power, whatever the kind or degree of restriction which he has thought fit to impose on its exercise—i. e. whether such

restriction be precisely the same in kind and degree as that imposed on the old power, or be greater or less in kind or degree. *Id.*

A general power of appointment over the fee will not be exhausted by an appointment to uses exhausting the fee, but reserving a power of revocation. *Id.*

Where a general power of appointment by deed or will has been exercised by an appointment by deed, reserving a power of revocation and appointment to new uses to be exercised by deed only, the creation of this last power to appoint by deed only cannot, without clear evidence of intention, be taken as operating to destroy the original power to appoint by deed or will; and, semble, that if it is to be taken at all affecting such original power, it is to be considered merely as in substitution of that branch of the original power which it purports to replace, namely, the power to appoint by deed. *Id.*

Semble, that two general powers of appointment in fee can exist in the same person at the same time. *Id.*

*Will—Precatory Charitable Trust.*—Where on the face of a will there is nothing to show that any trust or purpose was intended by the testator, other than a gift of the whole beneficial interest to the legatee, the plaintiffs, in order to succeed in setting the bequest aside, must prove by evidence a trust expressed, or such an engagement, by words or by silence, as will authorize the Court to say that the legatee undertook to do that which the law prevented the testator from imposing upon her—an express trust to devote the residue to an illegal charitable purpose. *Lomax vs. Ripley*, 19. Jur. 272. V. Ch. Stuart.

Where the evidence, parol and documentary, merely proves the wishes and intentions of the testator, and that he refrained by instruction and premeditation from declaring any trust, or imposing any obligation, or exacting any promise from their fulfilment from the legatee, and also that the legatee was, from the impulses of her own mind and disposition, bent on fulfilling the testator's wishes and intentions if she had the power, it falls short of what is required to establish the existence of any secret or honorary trust, the performance of which could be compelled on the footing of the breach of a promise or engagement which would have been binding on the conscience. *Id.*

Where a gift is in terms absolute, but accompanied with an expression of wishes in favor of another object, and a confidence in the honor and

justice of the legatee, unless the language is so express as to be imperative, and to exclude all option or discretion, they cannot bind the legatee or create a trust. *Id.*

*Will—Attestation by a Legatee.*—A testator by his will gave a legacy; he afterwards made a codicil, which was attested by the legatee. *Held*, that this did not affect the legacy. *Gurney vs. Gurney*, 19 Jurist, 298. V. Ch. Kindersley.

*Shipping—Freight.*—A cargo of wheat was shipped at a foreign port to be brought to the United Kingdom. The shipment took place when the vessel was in quarantine, in an open roadstead, and was made out of barges. The bill of lading was in the ordinary English form, signed by the master, the material part being as follows:—"Shipped, &c., in and upon the Prompt, whereof, &c., and now riding at anchor at Odessa, and bound for the United Kingdom, 3700 chetworths of wheat in bulk, to be delivered, &c., at the port of destination, (the act of God, &c., and every other danger of the seas, &c., excepted,) unto, &c., or their assignees, paying freight for the goods as per charter-party." By a memorandum in the bill of lading, *the quantity and quality was declared to be unknown to the master*. The provision in the charter-party, as to the freight of wheat, was, that it was to be according to the London-Baltic printed rates, which is a certain well known rate per quarter. The ship with the cargo arrived at Gloucester, and the wheat, on being accepted by the assignee of the bill of lading, was found to have increased in bulk by an admixture of water during the voyage, but there was no evidence to show from what cause this arose, or proof of any custom or usage relative to the payment of freight under such circumstances. *Held*, that freight was payable for the wheat according to its bulk at the time of loading, and not according to its bulk at the time of its delivery. *Gibson vs. Sturge*, 19 Jurist, 259. Exchequer. Martin, B., diss.

*Shipping—Registry Acts.*—The Court of Chancery cannot entertain the question, whether a ship was properly registered, but must take the registration as conclusive. *Combs vs. Mansfield*, 19 Jur. 271. V. Ch. Kindersley.

The Court will not relieve against the operation of the Ship Registry Acts, on the ground of equitable fraud or of notice. *Id.*

## NOTICES OF NEW BOOKS.

**The Doctrine of Equity ; a Commentary on the Law as administered in the Court of Chancery. By John Adams, Jun., Esq. Third American edition ; with the Notes and References to the previous edition of J. R. Ludlow and J. M. Collins, and additional Notes and References to recent English and American decisions, by Henry Wharton. Philadelphia, 1855 : T. & J. W. Johnson. pp. 918.**

Adams' Equity is a book which no longer needs commendation to bring it into notice ; the fact that it has already reached a third American edition, being a sure enough proof of its merit and its popularity. Its reputation is well deserved, for it certainly is one of the clearest, most condensed, and, at the same time, most comprehensive and accurate elementary works that we have. It is by far the best treatise on equity jurisprudence which can be placed in the hands of a student, and is not the less valuable as a book of reference for the practitioner.

We had occasion, on the appearance of the second edition of this work, to call attention to the full and careful American notes of Messrs. Collins and Ludlow, by which it was accompanied. The present volume embodies the labors of these gentlemen, and contains also additional notes, and references to the more important English and American decisions since the last publication. About two hundred pages of new matter appear to have been added. Anything further than this it would not be becoming for us to say, under the circumstances. Even the usual superlatives of a book-notice—meaningless and matter-of-course though they have grown to be—would be out of place. We can only express a hope that the present edition will prove as satisfactory to the profession as its predecessor.

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**Report of the Maryland Commissioners upon the Criminal Law, and upon certain branches of Civil Practice and Procedure. Prepared by William Price, one of the Commissioners. Baltimore : Cushings & Bailey. 1855. pp. 356, 8vo.**

We have to express our acknowledgments to the author for a copy of this interesting and valuable pamphlet.



THE  
AMERICAN LAW REGISTER.

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JULY, 1855.  
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ON THE MEASURE OF DAMAGES EX CONTRACTU.<sup>1</sup>

“As damages,” says Mr. Serjeant Sayer, in his treatise relative thereto, “are a *considerable object* in every mixed and in every personal action, a complete and accurate knowledge of the law relative thereto is very useful to all persons engaged in the profession of the law, and particularly to those who are concerned in the management of causes.” Such a knowledge, let us add, is by no means so much cultivated amongst our legal practitioners as it ought to be,—an assertion, the truth of which may in part be established by this fact, that, save the work by Mr. Serjeant Sayer just cited, no law-writer in this country has directed his attention exclusively to the subject of damages; nor in any of our standard treatises, or books of practice, has the matter now before us attracted that attention which it manifestly deserves; the very able treatise of Mr. Sedgwick, of the American bar, being the guide with us, as it is in the United States, when difficulty is felt in regard to it.

Under these circumstances, we deem it expedient to inquire, so far as our limits will permit, as to the leading principles upon which damages ought to be awarded, and more especially as to some moot

<sup>1</sup> From the London Law Magazine, vol. 53, p. 257, (May, 1855.)

points which will present themselves to the notice of any one who takes even a cursory survey of recent cases bearing upon the subject before us, adjudicated in our Courts.

The term "damages," we may remark, is used as synonymous with "pecuniary compensation" for a wrong or injury inflicted by one person on another, recoverable by action; the expression, "measure of damages," being employed to indicate the "scale" by reference to which damages are in any given case to be assessed.

Important as it might appear to be, that positive and definite rules should exist for regulating the award of damages, and reasonable as might seem the expectation that such rules could readily and accurately be traced out, we shall find that few intelligible maxims of a precise and practical kind are to be enunciated on this subject, and that, even in actions upon contract, to which we shall on this occasion exclusively direct our attention, a rather wide discretion is allowed to the jury in assessing damages, with the exercise of which, capricious or unsatisfactory as it may be, the Courts at Westminster will not willingly interfere, save indeed to prevent the most obvious injustice, or to set right the most palpable miscarriage.

The first question which demands attention in regard to the mode of assessing damages in an action on contract, is this,—in such a proceeding, can the intention, animus, or motive of the party charged be inquired into? Can it properly be taken into account in estimating the damages? Clearly, this cannot be done: the inquiry suggested would be wholly irrelevant to the issue joined. In such an action, the main questions for determination will obviously be—What was the contract? Was it broken by the defendant? If the terms of the contract in question be ascertained, and its breach be proved, the only other inquiry will be as to the amount of damages to be awarded; and in estimating these damages, the motive or intention of the defendant will be immaterial. If a man expressly covenants, or on good legal consideration promises to do an act, which he would not otherwise be bound to perform, he thus imposes on himself a responsibility from which he cannot be relieved, unless by duly discharging it, or by consent of the contractee; and if

guilty of a breach of his covenant or promise, he is at law compellable to make compensation in damages to the party injured. It is well known, indeed, that the measure of damages in actions of contract differs most materially from that applicable in actions of tort: in the latter class of cases the jury being permitted to take into consideration the animus of the offending party, and to assess the damages upon a general survey of all the circumstances adduced: the verdict being thus sometimes made to operate not merely as compensatory, but to some extent by way of punishment. Occasionally, even in actions of contract, a wide discretionary power is assumed by the jury in inflicting damages: from their hands a defendant who, to breach of promise of marriage, has superadded heartless conduct or insulting behavior, would, as we opine, find but little mercy.

In an action founded upon contract, then, the breach being proved, damages, nominal or substantial, will follow as a matter of course; and where an action is brought for breach of a contract to pay a certain and ascertained sum of money only, the remark of Lord Mansfield, in *Robinson vs. Bland*, 2 Burr. 1077, seems applicable, that the action under such circumstances, does, from the very nature of the case, become a suit for specific performance. To cases of this kind we need not occupy time or space by further allusion: in regard to them, the rule applicable being, that the amount which would have been received if the contract had been kept, is the measure of damages if it be broken." (*Alder vs. Keighley*, 15 M. & W. 117.) The rule thus tersely worded, holds true in a vast variety of cases which present themselves in practice; *ex. gr.*, where a covenant for the payment of money, a bond, bill of exchange, or promissory note, is put in suit, or where an action, as often happens, virtually undefended, is brought for the price of goods sold and delivered, for money lent, or for money due on an account stated. In such cases, the contracting parties themselves do in fact define the precise amount of liability to be incurred for breach of contract; and justice is done by giving effect to their stipulations.

If, however, the true measure of damages be not thus indicated,

the rules which are to guide us to it are laid down in language somewhat vague and general. Thus, "where a person makes a contract and breaks it, he must pay the whole damage sustained." "Where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed." (See *Robinson vs. Harman*, 1 Exch. 855, 856.) In order that rules thus expressed may be useful and available to the practitioner, they must be attentively considered by him in connection with each respectively of the leading species of contracts, their operation in each such case when thus considered, being noted down; in order that they may be intelligible to a jury, their practical effect, with regard to the facts before them, must fully be illustrated and explained. We shall here attempt, to a very limited extent only, thus to consider, illustrate, and explain them. and, in the first instance, we will cull almost at random, from our voluminous reports, a case or two of a simple kind, which may subserve this end. A. being indebted to B. for the price of goods sold and delivered, gave to this latter party a bill, drawn by himself (A.), to get discounted upon these terms: that B. should, out of the proceeds of the bill, retain to his own use 100*l.* and the discount, and should pay over the balance to A. Here the measure of damages, in an action by A.'s assignees against B., was held to be the amount of the bill in question, minus the 100*l.* and the discount. (*Alder vs. Keighley*, ante.) Again, C, having recovered a judgment for 281*l.* 3*s.* 6*d.* against D., agreed with E. to forbear to sue out execution upon the judgment until a future day; in consideration whereof, E. undertook that he would, on or before that day, erect a substantial dwelling-house, and cause a lease of the same to be granted to C., such lease when granted to be in "satisfaction" of the judgment. In an action by C. against E., for breach of this undertaking, the measure of damages was held to be the value of that (viz., the lease of the house in question) which the defendant had promised to give in consideration of the plaintiff's forbearance. (*Strutt vs. Farlar*, 16 M. & W. 249.) In either of the foregoing cases, nothing more was needed than strictly and literally to compensate the plain-

tiff, by assessing his damages at that precise sum which he had lost by the defendant's breach of contract.

Sometimes, however, the object here indicated is not so readily to be accomplished; sometimes the rule for the adjustment of damages is ill-defined. Where the action "sounds in damages" (a phrase by the bye, which Mr Sedgwick, in his *Treatise on Damages*, 2d ed., p. 205, note, declares himself "not able to understand"), that is, where the recovery of *damages*, and not of a *debt*, is sought for, it does not unfrequently happen that a jury finds itself imperatively called upon to award, on evidence conflicting and unsatisfactory, a precise sum, as accurately representing the damage sustained by breach of contract, and, whilst fixing its amount, well known that, after all without the slightest dereliction of duty on their part, but a rough approximation towards justice is thus effected. It not unfrequently happens, also, that the Court itself is puzzled in regard to the true rule for the assessment of damages, to be applied.

What, for instance, it may be asked, in the case of a breach of covenant to repair, is the true measure of damages? Is it, in accordance with the opinion of Lord Holt, the amount which would be required to put the premises in question into repair? *Vivian vs. Champion*, 2 Lord Raymond, 1125. Is it the loss which the landlord would sustain, if he sold his reversion in the market? as Mr. Baron Martin appears on a recent occasion to have thought. *Smith vs. Peat*, 9 Exch. 161. The latter criterion, in support whereof direct authority may be cited, would seem to be the most correct and just.

How, again, in an action for breach of an agreement of hiring and service, by a wrongful dismissal of the servant, should the damages be computed? The just measure of damages would here probably be attained by considering these two questions:—1st. What is the usual rate of wages for the particular employment? 2d. What time will probably be lost before a similar engagement can be found? (See per Erle, J., *Beckham vs. Drake*, 2 H. L. Cas. 606; per Crompton, J., *Emmens vs. Elderton*, 13 C. B. 508.) Again, in an action for contribution, to reimburse one of several joint contractors, who has paid the entire joint debt, or discharged,

under compulsion, the entire joint liability, what pecuniary amount is the plaintiff entitled to claim, as against any one of his co-contractors? It is curious to find that this question, *prima facie* so simple, and obviously of much practical importance, has but recently been thoroughly sifted and examined. It was resolved by the Court of Queen's Bench, in *Batard vs. Hawes*, 2 E. & B. 287, in a chain of reasoning ingenious and subtle, to which we would refer the reader.

In connection with the Contract of Sale, whether of land or personality, various points of more or less publicity invite attention. Contracts for the sale of real estate are, it is well settled, understood as having been made subject to the condition that the vendor has a good title; so that when a person contracts to sell realty, there is an implied understanding, that if (without fraud on his part) the vendor fails to make out a good title, the only damages recoverable will be the expenses necessarily incurred by the vendee in investigating the title; nominal damages only, under the circumstances here supposed, being awarded to him for the loss of his bargain. (Sugd. V. & P., 11th ed., vol. i. p. 424). Every one who purchases land, knows, or is presumed to know, that difficulties may exist as to the making of a title, which were not anticipated at the time of signing the contract; and should the intended purchaser think proper to enter prematurely into possession of his contemplated purchase, and to incur expense in improvements and alterations to it before the title is ascertained, he will do so at his own risk. (See the judgment, *Worthington vs. Warrington*, 8 C. B. 134.) Such is the general rule which determines the measure of damages in an action against the vendor, for breach of a contract of sale of land, there being no fraud, nor (as in *Hopkins vs. Grazebrook*, 6 B. & C. 31; and *Robinson vs. Harman*, 1 Exch. 850) any gross imprudence, or willful misfeasance on his part. And on the other hand where a party has been let into possession of land under a contract of purchase, which he then refuses to complete, and no conveyance is executed, it seems settled, too, that the vendor cannot recover from him the whole amount of the purchase-money, but only the damages, actually sustained by his breach of contract; the mea-

sure of damages, in an action of this nature, being the injury sustained by the plaintiff by reason of the defendant not having performed his contract. (*Laird vs. Pinn*, 7 M. & W. 474.)

In cases such as we have just specified, the mode of determining the damages recoverable for breach of contract is tolerably clear. Should special circumstances, however, be introduced into any one of them; should we, for instance, suppose that the purchaser of land has himself, relying on the assurance of his vendor that a good title could be made, to resell it before obtaining the conveyance to himself, doubt would immediately be felt in regard to the precise measure of damages to be applied; at all events, the pleader for whose opinion such a state of facts was submitted would be driven to a consideration of the doctrine respecting "remoteness of damage," to which we shall presently advert.

Let us next suppose that an action is brought for the non-delivery of the goods, pursuant to contract; the recognized measure of damages in this case is the difference (if any) between the contract price and the market price of the subject matter of the contract at the time of its breach (*Shaw vs. Holland*, 15 M. & W. 136; *Tempest vs. Kilner*, 3 C. B. 249,) when the vendee, should he previously have resold the goods, ought at once to go into the market and supply himself with the article in question, in order that he may thus be enabled to fulfill his sub-contract. *Peterson vs. Ayre*, 13 C. B. 353. A like measure of damages is applicable also as against the purchaser of goods, who in consequence of a falling market, refuses to accept them. *Phillpotts vs. Evans*, 5 M. & W. 475. Thus far, under ordinary circumstances, no difficulty presents itself. Are we, however, to understand that the above rule is inflexible? Under no conceivable circumstances, for instance, can the vendee recover as against his vendor the profits which would have accrued from their resale? This is an important question, by way of answer whereto little direct authority can be found in our books. According to the Scotch law, it is clear that, under circumstances such as supposed, the damages adverted to would be recoverable. For this proposition the well-known case of *Dunlop vs. Higgins*, 1 Ho. L. Cas. 381, is an express authority. It is moreover very no-



ticeable that, whilst moving judgment therein, the late Lord Chancellor Cottenham evidently assumes that the English law is *in conformity with* the conclusions which he then arrives at in regard to the law of Scotland.

That was an action for the breach of a contract to deliver iron; and a complete contract having been established, and its breach shown, the truth of the following proposition was contended for on behalf of the defendants (the appellants): that in case of failure to deliver goods sold at a stipulated price, and *immediately deliverable*, the true measure of damage is the difference between the stipulated price of the goods and their market price on or about the day whereon the contract is broken, or at or about the time when the purchaser might have supplied himself. In discussing this general proposition, the late Chancellor thus expresses himself:—"What does the party come into Court for?—to obtain compensation for the other party not having performed his contract." \* \* \* "The jurors had to *ascertain the damage* that had arisen from the non-fulfilment of this contract." His lordship then proceeds to illustrate the mode in which this might be done. Suppose, he says, a party who has agreed to purchase a certain quantity of iron on a particular day, has himself entered into a contract with somebody else, conditioned for the supply of that same quantity of iron, to be then delivered, and that he, not being able to obtain the quantity contracted for on that particular day, loses the benefit arising from the sub-contract. Assuming that the market price of iron had risen in the meantime, the plaintiffs ought not only to recover the difference between the contract and the market price, "*but also that profit which would have been received if the party had performed his contract.*" No other rule, proceeds his lordship, is reconcilable with justice, nor with the duty which the jury had to perform—that of deciding the amount of damage which the party had suffered by the breach of his contract. "Most cases of contract vary from each other; and whatever general rules there may be as to awarding damages, they must be modified by the particular cases to which they come to be applied."

His lordship thence concludes that the law of Scotland will do



what a *jury is called on to do here*, viz., effectuate and sanction the reimbursing of the party who has sustained the loss by the original contract, and that *without reference* to what the price of the article at the particular time will produce.

The remarks thus made, although incidentally, by a judge so cautious and painstaking as Lord Cottenham, certainly merit our attention; and with their tenor, the decision of the Court of Exchequer in *Waters vs. Towers*, 8 Exch. 401, to which we shall presently advert, is in close conformity. The truth perhaps is, that the ordinary rule for assessing damages, on a refusal to accept or deliver goods according to contract, may, under special circumstances, require modification. "If," says Mr. Justice Erle, in *Beckham vs. Drake*, 2 H. L. Cas. 607-8, "goods are not delivered or accepted according to contract, time and trouble as well as expense, *may* be required, either in getting other similar goods, or finding another purchaser; and the damages ought to indemnify both for such time, trouble, and expense, and for the difference between the market price and the price contracted for."

Another state of circumstances also suggests itself, viz., where the article contracted for does not appear to have any well-ascertained market value. In this case an investigation as to the constituent elements of the cost of its production or supply to the party who has contracted to furnish it, may become necessary, and the difference between such cost and the contract price will in such case be the measure of damages; so that if the cost equals or exceeds the contract price, the damages will be merely nominal.

Upon this part of the subject, the case of *Masterton vs. The Mayor, &c. of Brooklyn*, 7 Hill. (U. S.) R. 61, well deserves our notice. There the plaintiffs had contracted to procure, manufacture, and deliver all such blocks of marble as might be requisite for the completion of a certain public building about to be erected by them under a contract with the defendants. The marble in question was to be paid for by instalments as the work progressed: and immediately on signing the original agreement, the plaintiffs entered into a sub-contract with other parties, K. & Co., for a regular supply of the said marble. A small portion only of the marble having been

delivered by the plaintiffs, and pain for, according to their contract, by the defendants, these latter parties suspended their building operations, and refused further to perform their contract. Some considerable time after this breach, but as appeared in evidence, before the contract could possibly have been fully performed, the plaintiffs sued the defendants for breach of contract; and having proved their case, a question arose at *Nisi Prius*, and was subsequently argued before the Supreme Court of the State of New York, as to the nature of the scale by which the damages under the circumstances stated should be computed. The majority of the Court were of opinion that the test to be applied was the difference between the contract price of the marble and that which obtained in the market at the time when the contract was broken. "When," remarks the Chief Justice, "the contract, as in this case, is broken before the arrival of the time for full performance, and the opposite party elects to consider it in that light, the market price on the day of the breach is to govern in the assessment of damages. In other words, the damages are to be settled and ascertained according to the existing state of the market at the time the cause of action arose, and not at the time fixed for full performance." We may observe that the decision here arrived at has since been recognized in the United States (see *Story vs. The New York and Harlem Railroad Company*, 2 Selden U. S. R. 85), and may probably be thought to accord in spirit with the decisions in this country. Thus in *Hochester vs. De La Tour*, 2 E. & B. 678, it was held that a party to an executory agreement may, before the time for executing it has arrived, break the agreement, either by disabling himself from fulfilling it, or by renouncing the contract;—that an action will lie for such breach before the time has arrived for fulfilment of the agreement; and that the injured party may either sue immediately *ex contractu*, or wait till the time has come when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrongdoer. And it was further held that, in either case, the jury, in assessing the damages, would be justified in looking to all that had happened, or was likely

to happen, to increase or mitigate the loss of the plaintiff, down to the day of trial.

In cases such as we have above been alluding to, a question of much difficulty not unfrequently presents itself,—When may damage properly be regarded as “*too remote*” to be recoverable by action? In other words, what degree of connection between the breach of contract complained of and the damage sustained thereby, ought to exist in order that the party aggrieved may legally be entitled to compensation in respect of the latter? Common sense suggests that some limit should be assigned to the chain of events or circumstances linking together effect and cause; that the maxim, *in jure non remota causa sed proxima spectatur*, must in some sort be observed.

The subject of “*remoteness of damage*” in an action of contract was much considered by the Court of Exchequer in a recent case, *Hadley vs. Baxendale*, 9 Exch. 341, where the following rule in regard to it is laid down: that when the parties “have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract, should be such as may fairly and reasonably be considered either arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it.” Where (as the Court in the case just cited proceed to remark) a contract is made with reference to *special circumstances*, and *such special circumstances are communicated by the plaintiff to the defendant, and are thus known to both the contracting parties*, the damages which might reasonably be contemplated as likely to result from a breach of such contract would be the amount of injury which would ordinarily follow from a breach of contract under the special circumstances so known and communicated. But, on the other hand, if the special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in its contemplation the amount of injury which would arise generally, and, in the great multitude of cases not affected by

any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the event of a breach of contract occurring, by special terms as to the damages to be paid in such case; and of this advantage it would be very unjust to deprive them.

The facts in *Hadley vs. Baxendale* having been stated in a recent Number of this Magazine,<sup>1</sup> need not just now be recapitulated; with this case, however, should be compared two previously adjudged cases *Black vs. Baxendale*, 1 Exch. 410, and *Waters vs. Towers*, 8 Exch. 401. In the former of these cases, the plaintiff had sent certain goods by the defendants, who were carriers, to a country town, intending that they should arrive in time for the market there on a certain day, of which intention, however, *the defendants had no notice*. In consequence of the non-delivery of the goods by the defendants within reasonable time, expenses were incurred in removing them for sale to another place; and the jury included the amount of such expenses in their verdict. The Court of Exchequer seem to have thought that the jury were wrong in so doing, but, as the amount of their verdict was under 20*l.*, refused, in accordance with the recognized rule in such cases, to grant a new trial. "If," said Pollock, C. B., "the carriers had had distinct notice that the goods would be required to be delivered at a particular time, perhaps they would have been liable for those expenses for which, without such notice, they would not be liable; but whether any particular class of expenses is reasonable or not, depends upon the usage of trade, and various other circumstances;" remarks which do not seem to conflict with the well considered judgment of the Court of Exchequer in *Hadly vs. Baxendale*. In *Waters vs. Towers*, *ante*, the plaintiffs were held entitled to recover, under a declaration for breach of contract in not fitting up certain mill-gearing in a workman-like manner, and completing the work within a reasonable time, loss of profit which might have been made by the plaintiffs on a sub-contract for the supply of certain articles to be manufactured by them for a third party. And in this case

<sup>1</sup> See the Law Magazine for August, 1854, p. 18 (Digest). (This case is also commented upon in an article in 2 Am. Law Reg. 641.)

Mr. Baron Alderson is reported to have made this interlocutory remark, that "the existence of a contract, is evidence of the probable amount of loss sustained. Suppose the plaintiffs had said, 'We should have made such and such a contract if the defendants had performed theirs,' and the jury believed that the plaintiffs would have done so, that would surely have been evidence of the amount of loss occasioned by the defendant's breach of contract." The learned judge, however, would here seem to be laying down a wide, and, as we conceive, a rather dangerous doctrine, at variance, too, with the judgment in *Hadley vs. Baxendale*, where the fact of *notice of the sub-contract* having been given to a defendant under the circumstances suggested, or having been in some way brought within his knowledge, is specified as most material in regard to his liability. Various authorities, moreover, might be cited in opposition to the above-mentioned dictum of the learned baron: thus, in an action for breach of warranty of a horse, the loss of a bargain for the resale of the horse cannot be recovered as special damage: *Clare vs. Maynard*, 6 Ad. & E. 519. And the decision in *Hanslip vs. Padwick*, 5 Exch. 615, in reference to a contract for the sale of realty, to which the vendor has failed to make a title, is strongly to a like effect.

A review, however, of decided cases, seems to show that the rule has not been uniformly observed, or very clearly settled, as to the right of a party to claim a loss of profits as a part of the damages for breach of a special contract. Perhaps the best practical test which can be suggested for application is that laid down in *Fox vs. Harding*, 7 Cushing (U. S.) R. 522-3; viz., that if the profits claimed are such as would have accrued and grown out of the contract itself, as the *direct and immediate results* of its fulfilment, then they would form a just and proper item of damages to be recovered against the delinquent party upon a breach of the agreement. The realization of such profits as are here indicated, may, indeed, be considered as forming part and parcel of the contract itself, and must have been in the contemplation of the parties when the agreement was entered into; but if the profits in question are such as would have been realized by the party from other *independ-*

*dent and collateral undertakings*, although entered into in consequence and on the faith of the principal contract, there they are too uncertain and remote to be taken into consideration as a part of the damages occasioned by the breach of the contract in suit.

To illustrate what has been just said, let us take the case of a special contract, whereby one party to it agrees to make certain machines for the other, who, on his side, agrees to furnish, from time to time, the materials necessary for their construction; let us further suppose a breach of this contract by neglect to furnish materials; then the other party would clearly be entitled to recover the profit which would have accrued to him out of the contract if it had been fulfilled. But if the party suing for damages were to offer to prove *in addition to this*, that in consequence of the breach of contract by the defendant, he (the plaintiff) had lost other contracts by which he would have realized large profits, the evidence thus proffered would be wholly inadmissible, because such collateral undertakings were not *necessarily* connected with the principal contract, and could not reasonably be supposed to have been taken into consideration when it was entered into. Such profits would be too uncertain, remote, and speculative in their nature to be recoverable as special damages.

In connection with the foregoing observations, which have been abridged from the American case of *Fox vs. Harding* may be consulted *Stanton vs. Collier*, which recently came before our own Court of Queen's Bench, and is reported in 3 E. & B. 274. There the plaintiff (who was a printer) declared for the breach of a contract to re-deliver a printing-machine held as security for money due to him by the defendant, and which was to be re-delivered to the plaintiff upon certain stipulated terms. The damage alleged was, that by reason of the non-delivery of this machine, the plaintiff had lost great gains and profits, which would have resulted to him from its use; that his entire business and trade had been ruined, and that he had thereby become insolvent. Now, although no express decision was given by the Court upon the question whether the damage thus alleged was too remotely connected with the wrong done to be recoverable, it would certainly *seem* to be so; and it is

clear that the proper compensation, in the absence of special facts, would have been the *value of the machine itself*.

So, in *Theobald vs. The Railway Passengers' Assurance Company*, 10 Exch. 15, where the action, in form *ex contractu*, was brought to recover compensation from the defendants, in respect of an injury sustained by the plaintiff, one of their insured, whilst travelling by railway, the true measure of damages was held to be compensation for the personal injury resulting from the accident, not exceeding, however, the sum which the company would have been liable to pay in the case of death, and irrespective of any loss of time or profits consequential on such injury: for "what the insurance company calculate on indemnifying the party against, is the expense, and pain, and loss *immediately connected with the accident*, and not remote consequences that may follow, according to the business or profession of the passenger."

The cases latterly cited certainly throw some light upon the doctrine concerning "remoteness of damage," and upon what is meant by saying that, under ordinary circumstances, loss recoverable for breach of contract must be such as would *naturally* flow from the breach alleged. It cannot, however, be denied that the subject in question is still involved in considerable obscurity, which much time and litigation will be needed to dispel.

Thus far on the present occasion have we spoken touching the measure of damages in actions founded upon contract, not so much with a view to obviating or removing difficulties which may suggest themselves to him who cautiously explores the region through which we have but rapidly been passing, as in the hope that some deductions practically important may thence be drawn. We have shown (and a cloud of additional authorities might have been cited in support of the assertion) that, for an accurate assessment of damages in all, save the simplest, cases, two things are necessary,—first, a careful sifting and balancing of the evidence adduced; secondly, the application to that evidence of rules of law; couched not seldom in language which, if not vague or indefinite, at all events cannot readily be rendered intelligible to non-professionals.

Bearing this in mind, remembering also what has been already



intimated, that the damages in an action *ex contractu* should be assessed *dispassionately*, irrespective of the motive or animus which may have prompted to the breach complained of; we find ourselves impelled to this conclusion, that a jury of twelve *boni et legales homines* does not in very many cases which are now usually submitted to them, present the best medium through which the amount of pecuniary compensation payable to one aggrieved by breach of contract, may be determined; that the ends of justice would more surely be accomplished if in the class of cases adverted to, the judge were substituted for the jury as assessor between the litigating parties. The first section of the Common Law Procedure Act, 1854, does indeed enact that an *issue of fact*, by consent of the parties, subject to the discretion of the Court in banc, or a judge at Chambers, "may be tried and determined, and damages assessed where necessary, in open Court, by any judge who might otherwise have presided at the trial thereof by jury;" and that the verdict of such judge "shall be of the same effect as the verdict of a jury, save that it shall not be questioned upon the ground of being against the weight of evidence." We fear, however, that of these provisions, useful and excellent in tendency though they be, suitors will not be found in practice often to avail themselves; and we think that some further progress in the direction thus indicated may in all likelihood, when the working of recent enactments has been marked and tested, advantageously be made. To the suggestion thus put forth we shall recur in our next number, when we propose to direct attention to some points of difficulty connected with the measure of damages in actions founded upon tort.

[We have inserted the foregoing article from the London Law Magazine, both as an evidence of the increasing attention which is paid in England to American decisions and text writers, and as in itself a clear and able discussion of a difficult question. With the conclusions of the writer, we agree in the main. But we cannot let pass without some expression of dissent, the proposition that damages in actions *ex contractu* ought to be assessed in all cases, "irrespective of the motive or *animus* which may have prompted to



the breach." We cannot admit that such is or should be the law. On the contrary, we are convinced that good sense and natural justice indicate, and demand, where it can be fairly applied, a distinction between the failure to comply with an agreement arising from causes beyond the control of the party, or attributable only to ordinary negligence, unskillfulness and the like, and the violation of a contract, through malice, fraud, or that gross negligence which in its recklessness of the rights of others, is viewed by the law as next to fraud, *dolo proxima*. We do not now desire to argue in favor of the application of vindictive or punitive damages, in this connection, though we think it quite susceptible of justification. It is with reference to compensatory damages alone, that we would insist upon the validity and importance of the distinction which we have stated.

We are willing for the present, to assent to the doctrine that the object of a civil action is merely the enforcement of compensation for an injury suffered. What then? Compensation ought to extend to every species of hurt or damage which is inflicted by the wrongful act of another, so far as it is capable of pecuniary estimation. Nothing less than this will square with the principles of abstract justice. The injured party has, according to strict theory, the right to demand to be replaced exactly in the situation which he would have occupied had not the wrong occurred. So far we proceed on the supposition that the party injuring has no rights to be considered, and that practical and abstract justice are co-extensive. But this obviously is not always the case. Where one of the parties to a contract fails to comply with its terms, through accident or even negligence, where not culpable, it would not be equitable to visit upon him the extreme rigor of the law. He may justly claim not to be liable for more than the natural or necessary consequences of his conduct. We may even consider it implied in every contract, that in case of the inability of either party to comply with its stipulation, without fault, he is not to be held liable for any consequences therefrom which could not reasonably have been foreseen at the time the contract was formed,—that is to say, for any but its natural and probable

consequences. If this were not the case, no man would enter into any agreement. In cases of this nature, consequently, the party affected is entitled only to partial and limited redress, and must by reason of the reciprocal rights of the other party, be content to bear himself, some of the consequences of a comparatively blameless act or omission.

We may consider, therefore, that in an action for breach of contract, two elements enter into the consideration of the measure of damages; (1) the right of the plaintiff to complete compensation, (2) the claim of the defendant to have this abstract right restricted within limits, to be ascertained in accordance with the nature of the original contract.

Now, when we come to consider the case of a malicious, fraudulent, or reckless violation of an agreement, we readily perceive that the second of the elements we have specified, ceases to have a just application. The defendant has forfeited any claim to insist upon a limitation of the abstract rights of the plaintiff, or upon a recourse to any implied term in the contract, which he has thus chosen to abrogate and ignore. He has voluntarily placed himself in the position of a mere tort-feasor. Hence, we have nothing to consider but the single element of compensation to the injured party. Now in few, if any, cases, can damages, measured according to the natural and probable consequences of a breach of contract, afford anything like complete pecuniary compensation. The loss of contingent profits, of time, of expected bargains, injuries flowing from the consequent violation of agreements which the party has entered into on the faith of the completion of the contract, from the disarrangement of his plans, and many other such substantive injuries, while they would not have been foreseen, and cannot be brought within the general definition, are not the less real and hurtful to him, or susceptible of estimation in money. He cannot be replaced in his former position, and abstract justice be satisfied, unless he obtain redress as to these also. The necessary consequence is, that under the circumstances, the plaintiff must be entitled to recover for some, if not all injuries of the nature we have referred to, as well as for

those which are directly and necessarily consequent upon the wrong complained of.

This view of the question furnishes a complete refutation of the fallacy so often put forward, that as the party injured suffers to the same extent, whether the motives of the other were good or bad, so the claim to compensation must be the same in either case. The answer is, that where the motives of the latter were innocent, he can justly demand and does obtain a limitation of the compensation to be made; but, in the opposite case, no such controlling element exists, and full compensation ought to be exacted.

The arbitrary distinction, indeed, between actions in contract and in tort, in this respect, which is a consequence of this fallacy, is without any foundation in reason or analogy. Evidence in mitigation or aggravation of damages, is admitted without objection in the one, why not in the other? The only difference between the two is, that in tort, it may perhaps be assumed, in the first instance, that as there was no previous relation between the parties, the wrong was a deliberate and intentional one. But this, if true, would only have the effect of throwing the burden of proof of intention, in the case of contract, on the plaintiff; and, if it were proved, then the culpability of the defendant would be so much the greater, since he has superadded to a tortious act a breach of good faith. The non-fulfilment of an engagement, indeed, is neither more nor less than an injury to a right; and an attack on person or property is nothing else. For illustration's sake, suppose a banker, maliciously desiring to injure a depositor, refuses payment of a draft, having ample funds to meet it, and knowing that his act will produce bankruptcy, and for that very purpose. What difference is there, either in morality or in law, between such an act, and actual theft of so much money for the same purpose? Why then should there be a difference in the damages recovered?

The view which we have taken, moreover, is that which is most in accordance with our instincts of justice, and with the policy of the law. One of the highest objects of any system of jurisprudence, is the rigid enforcement of good faith and fair dealing.

In no country, much less in a commercial country, ought a man to be permitted to profit by the violation of a contract; yet the adoption of an unvarying rule, which restricts compensation to the natural consequences of the wrong, permits a man who finds that he can make a better bargain as to his time, his money, his property, than one which he has already entered into, to violate the latter with comparative impunity. Fraud, malice, caprice, are thus placed on the same footing with honest error, or blameless misfortune.

These conclusions are not speculative, nor the result of logical abstraction, but are embodied in every system of Jurisprudence, and in every civilized country, unless the Common Law form an exception. The Roman Law, and the countries in Europe and America which are governed by its principles, adopt precisely the distinctions which we have contended for.<sup>1</sup> We cannot affirm, indeed, that so far they have received entire sanction in our own law, which is quite unsettled on the subject, but we cannot doubt, from the tendency of the authorities on analogous questions, that it will not be long before they shall. Some cases have already recognized their propriety,<sup>2</sup> and time, we hope, will add to their number.—EDS. AM. LAW REG.]

<sup>1</sup> See Dig. XIX, tit. 1, fr. 43, § 1, 45; id. tit. 2, fr. 19; Mühlenbruck, Doctr. Pand. v. ii, § 368, etc.; Lindley's *Introduct. to Jurisp.*, § 167; Merlin, *Repository*, tit. Dommages—Interests, No. V.; Code Civil, art. 1147, etc.; *Motives sur le Code Civil*, vol. 5, pp. 20, 115, 218; Code Louisiana, arts. 1928, 2523. Pothier, in his treatise on Obligations, (1 Poth. Obl., by Evans, 166,) after stating the general rule, that a debtor is only liable for the damages which might have been contemplated at the time of the contract, proceeds thus: "The principles which we have hitherto established, do not prevail where it is the fraud of my debtor that gives me a claim for damages and interest; in this case, the debtor is liable indiscriminately for all the damages and interests which I have suffered in consequence of his fraud; not only for those which I have suffered in respect of the thing which is the object of the contract, *propter rem ipsam*, but for all damages in respect to any other property, without regarding whether the debtor could be presumed to have intentionally subjected himself to them or not; for a person who commits a fraud obliges himself, *velit nolit*, to the reparation of all the injury which it may occasion." See, also, Domat, by Cushing, vol. I. p. 776. In the Athenian Jurisprudence, similar principles obtained. Boeck *Publ. Econ. Athens*, by Lewis, 2d ed. 371; Smith *Diot. Ant.*, sub. verb. Βλαβης Δυνα.

<sup>2</sup> *Floureau vs. Thorhill*, 2 Wm. Blackst. 1078; *Bitner vs. Brough*, 11 Penn. St. 189; *McDowell vs. Oyer*, 21 id. 426.

## RECENT AMERICAN DECISIONS.

*In the Supreme Court of Delaware.*

## SALLIE B. DAVIS vs. SAMUEL B. DAVIS' EXECUTOR.

1. Proof of the regular execution of a testamentary paper establishes a prima facie case in favor of the party alleging a will.
2. Definition of a will.
3. The competency of parol testimony, in order to ascertain whether a paper writing purporting to be a last will, considered; and such testimony admitted.
4. The party propounding the will must show that the document in question was made as a will, by one capable of making a will, having a knowledge that he was making a will, and informed of its contents.
5. The executor and trustee, who takes an interest in a will, cannot be a witness to sustain it.

This case came up for trial before Harrington, Chief Justice, and Judges Wooten and Houston, and a special jury. It was an issue to try "whether the paper writing purporting to be the last will and testament of Samuel B. Davis, deceased, and heretofore admitted to probate, is or is not the last will and testament of the said Samuel B. Davis, deceased."

*Mr. Bates, Mr. George Browne*, of Philadelphia, and *Mr. Henry Winter Davis*, of Baltimore, for the plaintiff.

*Mr. Dallas*, of Philadelphia, for the executor.

HARRINGTON, C. J., charged the jury as follows :

On the 5th of July, 1853, Samuel B. Davis, long a resident of this State, put his signature to a paper writing which he then stated was his last will and testament, in the forms of law required as the evidence of so important an act as the testamentary disposal

of a man's property. The execution of this paper has thus been proved. It is to be taken to be the will of Colonel Davis, if nothing more appear either to impeach or to support it. It needs no further support on the part of those who set it up for a will, until something is shown to destroy or to impair the credit which it derives from the fact that it was signed as a will, and attested as a will, and published as his will, by the testator himself. This is what is meant by *prima facie* proof, or proof of the *factum*: a proof which, in ordinary cases, imposes upon any party denying the legal conclusion which is to be drawn from its execution, the burden of showing that it is not the will which these formalities make it seem to be.

Testamentary power is an important attribute of the right of property, and a great stimulus to its acquisition, and to the industry and care-taking necessary to its acquisition. The absolute right, therefore, of disposing of it according to the will and pleasure of the possessor, is to be recognized as a principle of justice, and of sound policy. It has not been denied or restricted in the argument of this case; but it is conceded that Colonel Davis had the right to dispose of the large estate which he possessed, according to his will and pleasure. It will be for you to decide whether he has done so.

The paper which I hold in my hand is proposed to you as the evidence of the will of Colonel Davis. It is opposed and objected to by the widow and children, who deny that it contains the evidence of his testamentary purposes, and who affirm that it never was his will. The Register, to whom it was offered for probate, has seen proper to take the advice of a jury on this question; and has sent to us for trial the issue, which you have been qualified to answer, "whether the paper writing purporting to be the last will and testament of Samuel B. Davis, deceased, and heretofore admitted to probate, is or is not the last will and testament of the said Samuel B. Davis, deceased?"

This, gentlemen, is a question of fact. It is so purely a question of fact, that formerly it was not the practice for the Court to

charge the jury upon the trial of such issues, supposing that its duty was discharged by merely presiding at the trial, regulating the proceedings, and deciding questions of evidence that might arise. Of late years the practice has been, for the Court to add a brief charge to the jury, with a view to direct attention to proper points for their consideration. We have been asked to do so on this occasion; and certain matters have been presented to us as legal propositions, upon which we are asked to charge you; but, after all, gentlemen, what law can there be applicable to the solution of a mere question of fact, which is not the law of common sense, belonging no less to others than to the judicial mind, and very fully shared by the intelligent jury whose duty it is to decide this case.

A *will*; what is it? and how is it to be known? Does it rest in the speech by which it is manifested, or the paper through which it is supposed to be communicated, or the act by which it is apparently indicated? All these are but mediums through which the purpose of the testator is to be understood by others; the will rests in his intention and purpose, the knowledge of which, though we may not in the nature of things ever reach it with demonstrative certainty, we satisfactorily attain to, just in proportion to the safety and reliability of the medium through which it is sought. This is a common sense remark, appreciable by you as fully as by any one, and yet it contains the foundation and substance of all the law on this subject. Does a man, in the full possession of his faculties, indicate by word, or writing, or gesture, that it is his intention a certain person shall have his property upon his decease, that is his *will*, even though the policy of the law may not allow it thus to be proved; and a man who, from any defect, mental or physical, or from mistake or deception, should in all the forms of law dispose of his property as he did not in truth *mean* to dispose of it, would not thereby express his intention, and the instrument would not be his *will*.

The force and value of the act done as indicative of the intention, must depend on all the circumstances surrounding it. If a man, capable of reading a paper, executes it with due formality, it is a



reasonable inference that he knows its contents, and that it contains his intentions. So strong is this inference in case of the execution of deeds and other instruments, that it becomes a *legal conclusion* which, under ordinary circumstances, the party is not permitted to deny; and this has, according to some of the cases which you have heard cited, been applied even to wills. You heard the question argued on an objection which was made to our admitting parol declarations of the testator to contradict the conclusion thus drawn from the act of executing the paper, an argument which was based on the *legal* as well as the *reasonable* inference from that act; but we considered, as it has heretofore been adjudged by our courts, that there is no such legal conclusiveness to be given to the formal act of executing a paper for a will as to preclude proof arising from the declarations and acts of the testator, before, at the time, or after, and all the surrounding circumstances, that the paper is not his will. Generally, the *animus testandi* is the natural and primary inference from the act of signing and formal publication; but this inference may be weakened or destroyed by any attending circumstances of sufficient force, by evidence of the weakness or incapacity of the testator to do, or of the want of intention actually to do, what he seems to do by that act. This is not admitting parol evidence to *vary* the will, but to ascertain whether it is really the *will* of the decedent.

We, therefore, throw the case open upon the evidence, not only in conformity with former practice, but as required by our judgment of the law, now again confirmed upon full and forcible argument. Proof, therefore, satisfactorily made, of instructions given by the deceased, of his declarations respecting his intentions, of his known affections or dislikes, of the position and quality of his estate, of previous testamentary intentions; of instructions or actual dispositions; of his own condition in reference to health or disease, of body or of mind; his physical infirmities, especially of the organs called into action in making or understanding a will—all these are in our judgment proper subjects of consideration on the important question, whether the paper does or not contain the real testamentary intentions and wishes of the party who signs it. Take them all, gentlemen,



and review the testimony on these and all other matters bearing on this question; I need not, and I will not particularize them; I might omit something in your view important, or present something differing in some respect from your views of the evidence of it; they are all yours, their force as well as their existence, and you must decide upon them. The whole evidence has been laid before you with great propriety, both of question and answer, studiously avoiding everything immaterial, and plainly presenting everything that might tend to elucidate the great question whether Col. Davis made this paper with a *knowledge* of its contents, and whether it expresses his *testamentary purposes*.

I shall mention only such facts as are necessary to notice the legal positions to be mentioned; and always subject to your correction. Col. Davis attained an advanced age; he was several years over eighty when this paper was signed; he was more or less blind; more or less deaf; the former from disease, relieved partially at one time by an operation; the latter from the ordinary consequence of advancing age, and the extent of which we specially submit to your decision; but as to his mental capacity it has not been questioned but that he was competent to make a will. He made a will prior to 1845, a portion of the contents of which has been proved by Mr. Huffington; he made a will in 1850, which is in evidence; and he executed this paper as his will in 1853. Is that his will?

In conducting your examination through the facts to a solution of this question, there are some rules of law that may aid you. One is the *onus probandi*. We have remarked upon this before. The party who alleges the will, must prove that it was made *as* a will and *with* a will, by a party capable of doing the act, having the knowledge that he was doing it, and having knowledge of the contents of the paper which professes to be the evidence of his testamentary purpose. It is not essential to be proved in any case that the will was actually read over by or to the testator, if there be other evidence sufficient to satisfy the Jury that he was made acquainted with its contents. A blind man may make a will; a valid will may be drawn by a party taking an interest under it; but the *blindness* of the testator, or

the *interest* of the party drawing and attending to the execution of the instrument, are circumstances tending to put the jury on their guard in scrutinizing the evidence which is offered to show *knowledge* of its contents. In *Harrison vs. Brown*, 3 Wash. C. C. Rep. 584, the proposition was submitted that it was necessary to prove the reading over of the will; but Judge Washington said it was not necessary, in order to establish a will, that the person claiming under it should prove that it was read over to the testator in the presence of the attesting, or of other witnesses. The law presumes, in general, that the will was read by or to the testator. "But if evidence be given that the testator was blind, or from any cause incapable of reading; or if a reasonable ground is laid for believing that it was not read to him, or that there was fraud or imposition of any kind practiced upon the testator, it is incumbent on those who would support the will, to meet such proof by evidence, and to satisfy the Jury, either that the will was read, or that the contents were known by the testator." See Eng. Ecc. Rep. 370; *Fincham vs. Edwards*, 3 Curtis, 63; *Ingram vs. Wyatt*, 1 ibid, 442; *Barton vs. Robbins*, 3 Phillim. 455, and 1 W'ms Ex'rs, 16, 293.

In *Barry vs. Butler*, 6 Eng. Ecc. Rep. 418, 9, it is said, "the strict meaning of this term '*onus probandi*'" is this, that if no evidence is given by the party on whom the burden is cast, the issue must be found against him. In all cases, this onus is imposed on the party propounding a will; it is in general discharged by proof of capacity and the fact of execution; from which the knowledge of and assent to the contents of the instrument are assumed, and it cannot be that the simple fact of the party who prepared the will, being himself a legatee, is in every case and under all circumstances, to create a contrary presumption, and to call upon the Court to pronounce against the will, unless additional evidence is produced to prove the knowledge of its contents by the deceased. "All that can be truly said is, that if a person, whether attorney or not, prepares a will with a legacy to himself, it is at most a suspicious circumstance of more or less weight, according to the facts of each particular case; in some of no weight at all, as in the case of a trifling bequest out of a large estate, but varying according to

circumstances ; for instance, the *quantum* of the legacy, and the proportion it bears to the property disposed of, and numerous other contingencies ; but in no case amounting to more than a circumstance of suspicion, demanding the vigilant care and circumspection of the Court in investigating the case, and calling upon it not to grant probate without full and entire satisfaction that the instrument did express the real intentions of the deceased. Nor can it be necessary that *in all such cases*, even if the testator's capacity is doubtful, the precise species of evidence of the deceased's knowledge of the will is to be in the shape of instructions for, or reading over the instrument. They form, no doubt, the *most* satisfactory, but they are not the *only* satisfactory description of proof by which the cognizance of the contents of the will may be brought home to the deceased. The Court would naturally look for such evidence ; in some cases it might be impossible to establish a will without it, but it has no right in every case to require it."

These quotations apply in principle to the case before you, and you must apply the facts of the case to them. Col. Davis was more or less blind ; the draftsman of the will, though not by name a legatee, took an interest under it as executor and trustee, the extent and force of which the jury must judge of in estimating the amount of suspicion that this circumstance throws over the case, and the corresponding necessity it produces of evidence to be required, in addition to the act of formal execution, to satisfy the jury that Col. Davis had a knowledge of the contents of the will.

The interest is such that we were obliged, under our view of the law of evidence, to exclude the executor and trustee from giving testimony in the cause ; but we remark, also, that it is not the naked interest of a gratuitous legatee, but an interest with an obligation of service. We leave its force in this connection, to your judgment ; and as to the relation of attorney and client existing between the draftsman and the supposed testator, it is not an absolutely disqualifying relation, but it is to be considered solely with reference to its bearing upon the question what amount of evidence of knowledge of contents the jury will require to be satisfactorily proved in order to establish the paper as a will. In most cases, an attorney

drawing a client's will, would not be a circumstance of remark, even where he took an interest under it, as where proof of capacity and of the factum are both complete ; in others, where capacity or knowledge of contents is the point of consideration, the circumstance may attract more or less attention from the parties and the attending circumstances. As a general principle, the law does not imply a controlling influence of a lawyer over his client.

The contestants ask us to charge that if the proof establishes either inability of the testator from blindness to read the will for himself, or that an interest is shown in the draftsman of the will and person managing its execution, the will fails, unless there be proof affirmative, beyond the act of execution, that it was read to the testator, or a knowledge of its contents otherwise communicated to him. We have answered this proposition affirmatively, in the quotations before made, and to which I have asked the jury to apply the facts in evidence.

But if that state of things is made out, it is alleged on the part of the executor that knowledge of the contents of this will, and proof of intention, are made out by the correspondence of its contents with previous wills made by Col. Davis. By the instructions given to Mr. Rogers to draw the will, by the circumstances attending its execution, other than the mere fact of signing and publication, which they say afford proof of actual reading, or at least the probability of it, in the absence of the testimony of the only person who knows the truth of that matter, but who cannot, by reason of his relations to the will, be heard. To this the contestants answer, denying the correspondence of this with previous wills ; denying the instructions or suggesting that the proof of the instructions is weaker than that of the paper they are invoked to support ; that there are many discrepancies between the supposed instructions and the instrument on trial sufficient in themselves, if not shown to have been explained to the testator, to render the will void, and that in respect to any evidence of actual knowledge of the dispositions contained in this paper, it has been met by proof of declarations made by the testator, that it contained other and different dispositions.

Gentlemen, we do not think it proper to enter upon anything like

an application of the evidence to these several propositions; the case has been fully and ably argued on them all, and that argument must be fresh in your recollection. We only call your attention to the topics, and leave the consideration of them to you. As to instructions, if they are satisfactorily proved to have emanated from the testator, with knowledge of their contents, they are evidence of *great force* in support of a will drawn in pursuance of them; and being generally but heads or suggestions, the proper amplification of them in the more formal instrument is right and proper; but as to essential variations this court said in *Chandler vs. Ferris*, 1 Harr. 464, that if the jury were of opinion that these differences existed to such an extent as to make the will essentially different from the instructions, they must then judge from the evidence whether these deviations were made with the knowledge and consent of the testator. If they were not made known to him, if the will was not read over, or its contents and variations from the instructions otherwise explained to him, then it would not be his will, but if he knew of and approved the alterations, he adopted them by the execution of the will, and the same ought to be confirmed. The same remark may be made, generally, of all declarations made by the testator, in reference to what was to be, or what had been inserted in his will. We have admitted such declarations in evidence as bearing on the question whether Colonel Davis knew of the contents of this paper and approved of them, as to which, if there be satisfactory evidence derived from other sources that he had such knowledge, these declarations would not be allowed to controvert the more solemn expression of intention in the will itself. But, in the absence of such other evidence of knowledge of its contents, and considered solely with a view to the question whether the paper was ever read or explained to him, declarations satisfactorily proved to have been deliberately made by him in good faith and credited by the jury, of testamentary bequests altogether different from the bequests of the will would be evidence to disprove his knowledge of its actual contents. Thus we have been specially asked to charge you, that if you believe from the evidence that Col. Davis actually thought the Fourth street property was devised to his daughter Har-

riety, or that Delamore Place was devised to his son Delaware Davis in this will, and they are not so devised, this would be evidence that the contents of this paper were never made known to him so that he understood it, and the paper could not therefore be established as his will. The two things are inconsistent, and therefore could not exist together. A person having testamentary capacity, could not believe he had devised important portions of his estate one way, while he had disposed of them another, on the same day of the execution of his will, if he knew of the contents of the will. At the same time the declaration of such belief is open to any remark tending to impeach its force, and subject as all other testimony is, to be weighed by the jury.

We suppose that we have now discharged ourselves of the burden of this cause so far as it rested on the Court. In its progress we have been called on to decide several questions of great general importance, and of particular consequence, perhaps, in the case itself, but none of them were new to the practice or consideration of the Court, though they were examined on this occasion with more thoroughness of research and argument than before. The result was announced at the time; and, though on one of the points there is a conflict of opinion among judges of high character, we had not and have not, any hesitation in adhering to the long continued and often repeated decisions of the Courts of this State. If the decision on the other point, ruling out the testimony of the only person, besides the attesting witnesses, who were present at the execution of the paper now under trial, shall be regarded as bearing hardly on the case, it is the consequence of an important rule of evidence which may not be violated without infinitely more of mischief than could happen by adhering to it in any case.

The case which is now committed to you is doubtless one of much importance in its general and particular bearings; but we commit it to you with entire confidence that you will decide it with intelligence and a conscientious regard to duty.

VERDICT.—The jury retired to their room at half-past 11 o'clock, and returned into Court at thirty-five minutes after 1 o'clock, P. M.

Upon being asked in the usual form, if they had agreed upon their verdict, they replied that they had. Whereupon, the foreman said, they found that the paper writing, purporting to be the last will and testament of Samuel B. Davis, was not the last will and testament of Samuel B. Davis.

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*In the Supreme Court of Georgia.*

THOMPSON vs. ALEXANDER.<sup>1</sup>

HIRING SLAVES.

1. A master cannot absolve himself from the legal and equitable obligation to take care of his slave; and if he refuse to do so, he is liable for medical and other relief furnished by others.
2. If a slave be hired to an insolvent, or be out of the possession of the hirer, and be placed in a situation to require instant and indispensable medical aid or other assistance; in such a case the owner, as well as the hirer, would probably be liable for necessary medical and other services.
3. The hirer of the slave, and not the general owner, is liable in an action for medicine and medical services rendered the slave while the term of hiring continued—the services and medicine not being rendered at the request of the owner, but at the request of the hirer.
4. A particular custom in a county, that the general owner shall pay the expenses, does not supersede or control the legal principle.
5. The hirer of a negro is not entitled to an abatement from the price on account of the sickness of the negro, unless the sickness originated in causes existing at the time of hiring, and which were unknown to the hirer.
6. The hirer of a slave is bound to use ordinary diligence, in regard to the health of the slave; that is, such diligence as a prudent man commonly takes of his own slave; and this ordinary diligence is to be employed, not only in protecting the slave from danger and disease, but likewise in discovering the disease if it exists, and in its treatment also.
7. If the hirer of a slave fail to perform his duty in supplying the slave with medical and other necessary assistance, the owner may do it, and look to the hirer for reimbursement.

<sup>1</sup> Reported in 14 Georgia Supreme Court Reports, 259, just published.



8. Under special circumstances, the hirer, although preliminarily liable to the physician, might, nevertheless, be entitled to relief, as between the owner and himself, especially in a Court of Equity.
9. If a slave hired for general and common service, be employed at any hazardous business, without the consent of the owner, and death, or any other damage ensue, the hirer would make himself liable for the injury.
10. Notwithstanding the hirer be answerable, in the absence of any agreement to the contrary, for expenses attendant on the sickness of a slave, it is competent to protect himself by contract.

Assumpsit, in De Kalb Superior Court. Decided by Judge Hill, April Term, 1853.

The facts of this case were as follows :

The plaintiff in error had hired a negro man to Joseph Thompson, in the city of Atlanta, for a year. During that period, and while the negro was in the possession of Thompson, he was attacked with smallpox. Thompson immediately called in Dr. Alexander, the defendant in error, as a physician to attend the negro, without previously notifying his owner that he was sick.

Dr. Alexander attended on the negro ; and on the refusal of the owner to pay his bill for so doing, brought this action to recover the amount.

No contract was shown between the owner and the hirer, as to who was to pay for medical services, in case of sickness ; but the testimony of several physicians was offered and admitted, to the effect, that it was their practice to charge the owner in such cases. A physician was permitted to testify his opinion, that the smallpox was a dangerous disease ; though he had never seen a case of it. To the above stated testimony defendant objected, and excepts to its admission by the Court. It appeared in testimony, also, that the owner of the slave resided in the country, six or eight miles from Atlanta ; that a great deal of alarm existed on account of the smallpox, while it prevailed in Atlanta ; and that intercourse between the town and country was very much obstructed by that alarm, though no legal obstacle was interposed.

This testimony was offered as a reason why the owner had not been notified of the negro's sickness.

The testimony being closed, the Court charged the jury, that if the slave was in such a condition that there was not time to notify the owner, without probable injury to the slave, that the hirer might call in a physician; and the physician could collect his bill out of either the owner or hirer, without notice to the owner.

The jury found for plaintiff; and the defendant excepted to the said rulings and charges of the Court.

The opinion of the Court was delivered by

LUMPKIN, J.—1. It is conceded that circumstances might exist, which would fix a responsibility upon the owner, not only without his consent, but even against his dissent. We believe the case of *Fairchild vs. Bell*, 2 Brevard, 129, to be of this description. There the owner of a female slave had cruelly beaten her, and had driven her away from his house and plantation, and exposed her to perish for want of food and from the pains of her bruises; and a neighboring physician, from motives of humanity, took the slave under his protection, and afforded her medical and other relief. It was adjudged, and we think very properly, that the action of *assumpsit* might be maintained, to recover from the owner a recompense for medicine and attendance, and for the sustenance of the wench during her illness, notwithstanding the defendant had forbidden him to receive the slave, or to give her any assistance.

The Court considered, as every enlightened tribune would do, that the master was bound, by the most solemn obligation, to protect and preserve the life of his slave; that he could no more divest himself of this obligation than could the husband and father the duty of supporting and maintaining a wife or child; that the slave lives for his master's service alone—his time, his labor, his comforts, are all at his disposal; and that consequently, the duty of humane treatment and medical assistance, when clearly necessary, ought not and cannot be withholden by the owner; and that if he cruelly and

capriciously attempts to do so, the aid and comfort denied by him, may be rendered by another at his expense; that in such a case, the master being under a legal and equitable obligation, a contract and liability will be implied, from the reason, justice and necessity of the case.

But this is a case where no other person is substituted for, and made to stand for the time being, in the *quasi* relation of master to the slave.

2. But I will go further. In my opinion, the bare fact that the negro had been hired to another, does not necessarily, and under all circumstances, absolve the owner from the duty which he owes, both to the slave and to the community, to afford him protection, and provide for his wants in sickness and in old age. Suppose the hirer is insolvent, or permit the slave to absent himself from him, and his life is in imminent danger, from disease, or any other cause? In a case so circumstanced, I should not hesitate to hold the master bound to make compensation to the physician, victualler, clothier, or any other good Samaritan, who would interpose, through humanity, to administer to the wants of the suffering slave.

3. But the cases supposed are not the one before us. It is not pretended but that the hirer, Dr. Thompson, is abundantly able to pay. The negro was in his possession. Nor was the emergency so sudden and pressing as to take the case out of the rule, which will not allow one man to make another his debtor against his will; and which holds that if one sees my fence out of repair, and he planks it up, to protect my property from depredation, that he can neither charge me with the expense, nor afterwards even take away the plank which he has nailed to my posts.

The only question in this case, then, is whether Dr. Alexander is to look to Dr. Thompson, who employed him, for his bill, or is at liberty to charge Mr. Latimer, who did not employ him, nor have any knowledge of the sickness of the slave, or of the plaintiff's attendance, although he resided within six or eight miles of Atlanta at the same time.

The Supreme Court of North Carolina, in *Haywood vs. Long*,

5 Iredell, 438, have answered this identical inquiry. They say, "We think very clearly the former, (Dr. Thompson.) If, indeed, the slave had not been hired out, the owner would not be liable for the physician's bill, unless there was a request of the owner, or subsequent promise to pay. At least, that must be the general rule; though it may be liable to an exception, that where it is a case of life and death, or there is a pressing necessity for immediate assistance, the master would be liable for the attendance that was indispensable before there was a reasonable time or opportunity for notice to the master.

But unless in case of that kind—if even in that—the services of the physician, without the request of the owner, and at the instance of the slave or any one else, must be deemed gratuitous in respect to the master."

The Court notice the decision of Lord Kenyon, at *Nisi Prius*, in *Scarman vs. Castell*, 1 Esp. Rep. 270, where it was held, that the master was liable for medicine for his servant, while in his service, on the same ground that he was bound to provide food and lodging for him; and then proceed:

"But surely, if liable at all, he ought not to be until notice of the necessity, and his refusal to neglect to provide attendance and medicines." But the very reasons given in that case, says Judge Ruffin, "show that *this plaintiff* cannot recover; for the liability is confined to the case in which the servant is under the master's roof, as a part of his family, and put upon the same footing as that for necessary food; thus placing the liability in *this case*, upon the person who was *in possession* of the slave—who was also the employer of the plaintiff."

"In this Court there has been no case of this kind before; for we believe it has never been suggested hitherto, that the revisioner, if he may so be called, merely as such was liable for medical services for the slave, more than for his food, while hired out, where they had been rendered, not at his request, but at that of his possessor."

The case of *Jones vs. Allen*, 5 Ired. 473, was the same as that of

*Haywood vs. Long*, except that the plaintiff offered to prove, as he attempted to do in the case under consideration, that in the section of the country where the hiring took place, it was the custom for the owner, and not the hirer, to pay for the medical attendance on a slave. The Court again held, that there was no doubt of the liability of the temporary owner of hired slaves for the expense of their maintenance and medicine during sickness; and that the general law upon that point must operate, and could not be controlled by any understanding to the contrary in particular neighborhoods: that there was no established general custom on the point; for if there was, that would in truth be the law. But that a mere local usage, in a small part of the country, cannot change the law, and give the plaintiffs an action against one man, when they were employed by another.

This question has been made and determined in the Courts of South Carolina. In the case of *Wells vs. Kennedy*, 4 McCord's Rep. 182, the Court of Appeals of that State held, that the general owner was not liable for the doctor's bill, either by the rules of law or the policy of the country; for that the hirer had no more right to throw the expenses of the negro's sickness upon the general owner, than to an abatement of the hire during the period of sickness.

As early as 1823, it was decided in our sister State of Alabama, that the *hirer* of a slave is bound to pay the physician for his services; and that the *owner* was not liable, unless he had requested services of the physician. *Meeker vs. Childress*, Minor's Rep. 109.

And this decision, made at this early history of the Supreme Court of that State, being the first year of its organization, has been acquiesced in and considered as law since that time. See *Gibson vs. Andrews*, 4 Ala. Rep. 766.

Cases from other slave States might be cited. I am content with those which have been adduced, coming, as they do, from our nearest neighbors on both sides, and States whose social condition is so similar, in all respects, with our own.

4. That a contrary understanding prevails in some portions of

our State, we know to be true; and one that has originated entirely in considerations of policy. It has been supposed that slaves that are hired are more likely to be neglected, if the temporary owner is made liable for physicians' bills. But we apprehend that the whole law regulating this contract, is properly understood, that no such consequences will follow.

5. It is now settled in this State, that one to whom a slave is hired for a year, is entitled to no abatement of the price because of the death of the slave, after the commencement of the term. This, of itself, will constitute a strong motive for taking care of the slave; for the hirer, seeing that he is bound to pay for the negro for the time stipulated, living or dead.

Then again, it has never been supposed, I think, that the hirer is entitled to a discount for the loss of the service of the negro hired, on account of sickness, unless it originated in causes existing at the time of the hiring, and which were unknown to the hirer. For all purposes, the law looks upon this contract as *quasi*, a sale *pro tempore*. All the owner undertakes is, that the negro is sound at the time; and the hirer takes the chance of his remaining so. And here, again, is a direct appeal to the interest of the hirer, to take care of the slave, that he may be able to perform the service for which he was employed.

6. But besides this, and what, perhaps, is not so well understood, the hirer of a slave is bound to use ordinary diligence in regard to the health of the slave; that is, such diligence as a prudent man commonly takes of his own slave, placed in like circumstances. He must not only use ordinary diligence in protecting the slave from danger and disease, but ordinary diligence in discovering disease if it exists; and ordinary diligence in its treatment.

7. And failing to perform his duty in this particular, the hirer will not only make himself personally responsible to the owner for what injury results from his neglect, but the owner himself would have the right to supply the necessary medical aid and look to the hirer for remuneration. In addition to all this, the owner may still

furnish any supplementary assistance which he may see fit. Fixing the legal liability upon the hirer, does not preclude him from indulging to any extent his wishes in this respect. And so far from rejecting his proposed aid, the hirer will be gratified, no doubt, to have all his diseases speedily healed.

Whether this case, then, is to be determined by the principles of law or the policy of the Courts, we are well satisfied that this action cannot be maintained. There is no privity of contract between Dr. Alexander and Mr. Latimer. So far as Mr. Latimer was concerned, the services rendered the slave were wholly gratuitous.

And could any case arise, which would better enforce the rightfulness of this doctrine than the present? This slave was bid off by Dr. Thompson at the beginning of the year, at public outcry, at \$91. He is employed as a waiter in the hotel of Dr. Thompson, at Atlanta. A guest is attacked with smallpox, and the boy is put to wait on him, and contracts the disease; for the treatment of which an account is raised, reasonable enough, I have no doubt, against Mr. Latimer, as the guardian of an orphan, of \$100! Mr. Latimer had, by the contract of hiring, lost all control over the slave. He had no right to remove him from exposure to the epidemic, or to prevent him from being placed in contact with it. And yet, when the negro is attacked, without being notified of his situation, living as he did in the vicinity of the place, a physician is called in, and he is made chargeable for a bill exceeding by nine dollars the whole year's hire! Well might the Court say in this case, in *McCord*, "There is no foreseeing the consequences that might result to the *owners* of slaves, if they were made liable for services rendered under such circumstances."

8. We have not decided, nor do we intend to say, that under certain circumstances the hirer might not have relief against the owner, especially in a Court of Equity, for medical services rendered the slave. Suppose, for instance, that a disease should exist and develop itself during the term, which might not materially incapacitate the slave from labor during the period for which he was hired, and yet one which, from its character, would not admit of



delay or postponement in its treatment until the end of the term. In such case, it would be manifestly unjust that the whole expense, or even perhaps the greater part, should fall on the temporary owner. He should be entitled to apportionment.

So in the present instance, if the negro contracted a dangerous disease, *without fault on the part of the hirer*, and the case required instant indispensable assistance, the entire loss should not fall on the hirer, perhaps. And although primarily liable to the physician, he might go into Chancery and obtain redress, as against the owner, if remediless at law.

9. Upon that point, however, we express no opinion. For the law, I know, will not permit a slave, hired as this was, for general and common service, to be employed in any hazardous business, without the consent of the owner. And if death were to ensue from such employment, the hirer would make himself liable for the value of the slave.

10. Of course it may be made the subject of contract, whether the expenses attendant on the sickness of a slave be borne by the master or the person who hires him. But in the absence of any such agreement, we are clear that it is not only in conformity with the abstract principles of law, but of sound policy also, to hold the hirer answerable. Not only is the absolute control of the slave surrendered by the master for the time being, but the obligation to supply his daily and hourly wants, would seem necessarily, and in the natural course of things, to be devolved upon the other person, who assumes the absolute possession of the slave.

Our unanimous opinion, therefore, is, that the judgment be reversed.

*In the Supreme Court of Louisiana, April, 1855.*STATE vs. JAMES PATTON, APPELLANT.<sup>1</sup>

On a trial for murder, the prisoner's counsel were about calling witnesses to prove his insanity, when he interposed, refused to permit that defence to be set up, discharged his counsel and submitted his case to the jury without evidence. The counsel remonstrated and offered to establish his insanity by irresistible proof, but the Court overruled their objection, and refused to hear them further in his defence. *Held*, to be error, and that the evidence should have been permitted to go to the jury.

Appeal from the First District Court, New Orleans.

The opinion of the Court was delivered by

SPAFFORD J.—Upon the trial of James Patton for the murder of Walter Turnbull, the following bill of exceptions was taken by the prisoner's counsel:

Be it remembered, that on the trial of this cause, on the 20th day of March, 1854, after the evidence on the part of the State was closed, and when the counsel of the prisoner were proceeding to prove by the evidence of witnesses, the insanity of the said prisoner at the time of the killing set forth in the indictment, and a long time before, and ever since the said killing; the said prisoner arose and objected to and repudiated the said defence, and insisted upon discharging his counsel, and submitted his case to the jury without any further evidence or action of his counsel in his defence; his counsel opposed and remonstrated against the prisoner's being permitted to do so, alleging that they were prepared to prove the defence by clear and irresistible testimony; but the court overruled the objection of the said counsel, and permitted the prisoner to discharge his counsel, and refused to hear them further in his defence, and gave the case to the jury without any further evidence or pleading on his behalf; to all which opinion and ruling of said court the defendant's said counsel excepts, and prays his exceptions may be signed, &c.

(Signed) JOHN B. ROBERTSON, *Judge*.

<sup>1</sup> Monday, April 19th, 1855, before Thomas Slidell, Chief Justice; Cornelius Voorhies, A. M. Buchanan, A. N. Ogden, and H. M. Spafford, Associate Justices.

There was a verdict of "guilty without capital punishment"—and, after the former counsel had in the quality of *amici curiæ* attempted to obtain a new trial and arrest of judgment without success, the prisoner was sentenced to hard labor for life in the penitentiary.

From this judgment the present appeal has been taken:—

The sanity or insanity of the prisoner is a matter of fact; the admissibility of evidence to establish his insanity, under the circumstances detailed in the bill of exceptions, is a matter of law, and the only matter which the constitution authorizes this tribunal to decide.

The case is so extraordinary in its circumstances that we are left without the aid of precedents.

In support of the ruling of the district judge, it has been urged that every man is presumed to be sane until the contrary appears, and that a person on trial for an alleged offence has a constitutional right to discharge his counsel at any moment, to repudiate their action on the spot, and to be heard by himself; hence the inference is deduced that the judge could not have admitted the evidence, against the protest of the prisoner, without reversing the ordinary presumption, and presuming insanity.

In criminal trials, it is important to keep ever in mind the distinction between law and fact, between the functions of a judge and those of a jury.

It was for the jury, and the jury alone, to determine whether there was insanity or not, after hearing the evidence and the instructions of the Court as to the principles of law applicable to the case.

By receiving the proffered evidence for what it might be worth, the judge would have decided no question of fact: he would merely have told the jury, "the law permits you to hear and weigh this evidence; whether it proves anything, it is for you to say."

By rejecting it, he deprived the jury of some of the means of arriving at an enlightened conclusion upon a vital point peculiarly within their province, and, in effect decided himself, and without the aid of all the evidence within his reach, that the prisoner was sane.

It is idle to say that the legal presumption, and the prisoner's own declarations, appearance and conduct on the trial, established his sanity to the satisfaction of both judge and jury;—for presumption may be overthrown, declarations may be unfounded, and conduct and appearances may be deceitful; and the prisoner's counsel, sworn officers of the court, with their professional character at stake upon the loyalty of their conduct, alleged that they stood there prepared to prove by what they deemed clear and irresistible testimony, that the accused was insane at the time of the homicide, long before, and ever since; so that the sole inquiry now is, not whether they or the Court were right as to the fact of sanity upon which we can have no opinion, but, whether they should have been allowed to put the testimony they had at hand before the jury, to be weighed with the counter evidence.

If the prisoner was insane at the time of the trial, as counsel offered to prove, he was incompetent to conduct his own defence unaided, to discharge his counsel, or to waive a right.

Upon the supposition that the counsel were mistaken in regard to the weight of the evidence they wished to offer, as they may have been, still its introduction could do the prisoner no harm, nor could it estop him from any other defence he might choose to make on his own account; neither could it prejudice the State, for it is to be presumed that the jury would have given the testimony its proper weight; if, on the other hand, the counsel were not mistaken as to the legal effect of this evidence, the consequences of its rejection would be deplorable indeed.

The overruling necessity of the case seems to demand that, whenever a previous soundness of mind and consequent accountability for his acts are in question, the rule that he may control or discharge his counsel, at pleasure, should be so far relaxed as to permit them to offer evidence on those points, even against his will. Considering therefore, that it would be more in accordance with sound legal principles and with the humane spirit which pervades even the criminal law, to allow the rejected testimony to go before the jury, the cause must be remanded for that purpose.

It was said in argument, on behalf of the State, that the alleged

insanity was, at most but a monomania upon another topic, which could not exempt the prisoner from responsibility for the homicide.

The judge will instruct the jury in regard to the principles of law which govern this subject, when all the facts shall have been heard. At present, the discussion is premature.

It is therefore ordered, adjudged and decreed that the judgment of the Court below be reversed, the verdict of the jury set aside, and the cause remanded for a new trial according to law.

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*In the Supreme Court of Texas.*

JOHN F. JORDAN vs. F. A. POLK.<sup>1</sup>

1. Special administration,—*Power of the County Courts to appoint.*—The County Courts of this State may grant letters of limited administration upon the estates of deceased persons. This power existed under the Act of 1794, ch. 1, § 47, and is clearly created and defined as to the estates of non-resident decedents, by the acts of 1842, chs. 69 and 165. But such special administration does not prevent a grant of the general administration in a *proper case* to a different person; and the two administrations may well subsist together.
2. Same,—*Rights of next of kin and creditors.*—A limited administration, as contemplated by the laws of this State, is not within the letter or spirit of the law prescribing to whom the general administration shall be granted. The next of kin or creditors cannot claim a right to special administration, if occupying an antagonistic relation to those who represent the deceased. So, where the deceased, a non-resident, had no estate in the limits of this State, except the subject of a suit which he was prosecuting at the time of his death against his brother, it was no error in the County Court to refuse the general or special administration to such brother, and confer the special administration upon an indifferent person.

A suit was instituted in the Chancery Court at Columbia, by James F. Jordan against John F. Jordan and others. Pending this suit, James F. Jordan, the complainant, died in Texas, of which State he was a citizen. His interest in this suit was the only estate he left within this State. His counsel applied to the County Court of Maury for letters of special administration to carry on the suit, and recommended the defendant in error for said

<sup>1</sup> Sneed's Texas Reports, vol. 1, p. 430. We are indebted to one of the learned counsel engaged in this cause for an early sheet of this report in advance of publication.—*Eds. A. L. Reg.*

appointment, who was neither of kin nor a creditor of the deceased. This application was contested by John F. Jordan, one of the defendants in the bill, who claimed the general administration as next of kin to the deceased. The County Court refused said application of John F. Jordan, and appointed the defendant in error special administrator to carry on the suit. Jordan appealed to the Circuit, where Judge Martin affirmed the action of the County Court, whereupon Jordan appealed in error to this Court.

*U. S. Frierson*, for the plaintiff in error :

1. The next of kin of an intestate by law, and as a matter of right, is entitled to the administration of the estate. 1 Meigs' Dig. 20.

2. The next of kin cannot be deprived of this right unless there are more claimants than one; then the Court may elect to whom the administration shall be committed. 1 Meigs' Dig. 20; Martin & Yerger, 43, 45.

3. But if the applicant is simply opposed by the other next of kin, it would be error in the Court to refuse to commit it to the applicant. Martin & Yerger, 43, 45.

4. But this is an application for a special administration upon the estate of a non-resident intestate to prosecute a suit, and is not governed by the general law. We deny that the Court can appoint any such *special administrator* upon the estate of a non-resident.

1. By the Act of 1841, ch. 96, § 1, the County Courts of this State are authorized to appoint administrators generally upon the estates of non-resident intestates, without saying to whom.

2. The Act of 1842, ch. 165, § 1, declares that letters of administration shall be granted upon application of any person interested, his or her agent or attorney, showing that the legislature intended to secure the right to the next of kin, as heretofore.

3. The administration should not as a matter of justice to our own citizens, be a special one; because, if it were, such administrator could not be sued by creditors, and the assets which should be appropriated to the payment of debts would be collected and transferred to a foreign jurisdiction, and domestic creditors sent there to

collect their demands, when it might have been done here. 8 Humphreys, 558.

4. The only remaining objection to appointing the next of kin, is, that he is the debtor of the estate. This is no legal objection, for his indebtedness would be assets of the estate, for which he and his securities would be liable; and this is an answer to the objection.

*W. S. Flippen*, for the defendant in error :

There may be several different administrators, general, limited, *pendente lite*, and special. The word special, embraces all other administrators save the three first named. One may be executor for a particular thing, Wentw. on Ex'rs, p. 12, and so it necessarily follows, one may be administrator for a particular thing, for the law in this respect is the same. "And where there is no general representative an administrator or special representative limited to the subject of the suit," may be appointed. See Williams' Ex'rs, vol. 1, p. 329.

We assume the ground that Jordan, upon no principle, could be administrator in this case. He could be neither general or special administrator. Had the Court appointed him, he would have been appointed to prosecute a suit against himself. This was the whole object of administration; and in the language of Mr. Justice Buller, "it is impossible to say a man can sue himself." 1 Williams' Ex'rs, 779, where is cited *Moffett vs. Van Millengen*; 2 Bos. & Pull. 124, note c.; 2 Chitty, 539; and *Fitzgerald vs. Boehm*, C. B. Moore.

If it be insisted that the Court erred in not appointing a *general* instead of a *special* administrator, (which is not admitted,) still some one should have been offered other than Jordan, and the record does not show that such was the fact. Polk was the only other person offered; he was unexceptionable in every particular, as much as any *next of kin* or *other most lawful friend* that might have been presented. The Court, using its discretionary power, we insist, acted properly in refusing to appoint Jordan general administrator, and in appointing Polk.



The opinion of the Court was delivered by

**McKINNEY, J.**—This was an appeal from an order of the County Court of Maury, granting a limited administration upon the estate of James F. Jordan, who, at the time of his death was a non-resident.

It appears from the record that James F. Jordan died intestate in Texas, of which state he was a resident. Previous to and at the time of his death, there was pending in the Chancery Court at Columbia, in this State, a suit in which he was a complainant, and the plaintiff in error was the principal defendant. The intestate had no other property or assets within the State at the time of his death, or at the time of the grant of administration, except the subject matter of said suit. For the sole purpose of prosecuting this suit to a final termination, the counsel of the intestate applied to the County Court of Maury, in which county the Chancery Court in which this suit was pending, held its sessions; to have a limited administration granted upon the intestate's estate, and nominated the defendant in error, who was not of kin to the deceased, nor a creditor of his estate, nor interested in the suit. The plaintiff in error, who is a brother of the intestate, appeared and claimed, as next of kin, to have a general administration upon the estate of the intestate, committed to him. But the Court refused this application, because he was the principal defendant in said suit, against whom a decree was sought, and had an interest in opposition to that of the representatives and distributees of the intestate's estate, and proceeded to grant a limited or special administration to the defendant in error. An appeal was presented to the Circuit Court, and the judgment being affirmed, the case is brought here by an appeal in error.

The first error insisted upon, is, in the grant of a limited administration. It seems to be thought that, under our law this is not admissible, and that none other than a general administration can be granted; we do not think so. It is well settled in England, that such limited administrations may be granted. The grant may be limited either to certain specific effects of the deceased, or to a certain specific purpose, as to filing a bill, or carrying on proceedings

in Chancery. 1 Williams on Ex'rs, (ed. of 1849,) 431; 1 Hagg. 93; 2 Hagg. 62; 3 Phillimore, 315.

And it is now well settled, that if such limited administrator is made a party to the suit, the estate of the intestate is properly represented, so as to enable the Court to proceed in the cause, and a decree obtained against such an administrator will be binding on any general administrator. 1 Williams on Ex'rs, 435; 3 Hare, 199, 208.

But such a limited or special administration does not prevent a grant of the general administration, in a proper case, to a different person. The party entitled to the general grant might take what is called an administration *cœterorum* or an administration of all the other property or assets of the intestate. And the two administrations may well subsist together. 1 Williams on Ex'rs, 431, 436.

It was held in the case of *McNairy vs. Bell*, 6 Yerger, 302, that a limited administration might be granted by the County Court. This was allowable under our law prior to the act of 1842, ch. 69, and 165, which expressly authorizes a limited administration upon the estate of a person, who, at the time of his death, was a non-resident, where the decedent left any estate, real or personal, in this State, or where any suit in which his estate is interested, is to be brought, prosecuted, or defended; or where any citizen of this State, or other person, having property, *choses in action*, or debts due them within this State, was indebted to such decedent at the time of his death.

The authority of the County Court to make such limited appointment, is, therefore placed beyond all question. And in the present case there was no pretence for a general administration, as there was no assets within the jurisdiction of this State. Secondly, it is urged, that admitting the regularity of a limited grant of administration, the plaintiff in error as next of kin, was entitled to be appointed; and, that therefore, in the appointment of the defendant, there was error. This position is equally as untenable as the preceding one. In England, the Ecclesiastical Courts would not put a litigant party in possession of the property, or subject of the suit, by

granting to him a limited administration pending the suit, but to some one presumed to be indifferent. 1 Williams on Ex'rs, 410. Nor, under our law, can either the next of kin, or creditors, claim a right to such appointment, if occupying an antagonistic relation to those who represent the deceased party. A temporary administration of this sort is not within the letter or spirit of the law prescribing to whom the general administration shall be committed; and it would seem singularly absurd to require that such special administration should be granted to a party whose interest, and perhaps whose first act would be to defeat the very purpose of the grant. Such is not the law.

There is no error in the record, and the judgment is affirmed.

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*Supreme Court of Texas. Galveston, 1854.*

EDWARD RUSSELL'S HEIRS vs. HARVEY RANDOLPH.

1. A grant of land fraudulently obtained, is void *ab initio*, and no title passes to the grantee, nor is the land separated from the public domain, but remains subject to be located upon a valid certificate.
2. Domicil defined and considered.
3. Practice in the Land Office in Texas.

*Allen & Hale*, for Plaintiff in Error.

*H. Yoakum*, for Defendant in Error.

The opinion of the Court was delivered by

LIPSCOMB, J.—Edward Russell, the ancestor of the plaintiff in error, came to Texas some time in 1834, and the 21st day of August, 1835, obtained a grant for one league of land in the present county of Montgomery, and shortly thereafter left for the State of Maine, avowedly for the purpose of bringing out his family to settle upon the land conceded to him, and shortly after reaching his family in the State of Maine, where they had remained whilst he was in Texas, he died. In 1841 or '42, Mr. Norton with his family, his wife being a daughter of Edward Russell, cultivated and made a crop on the land, and they have resided ever since in the State of Texas.

In 1849, the defendant in error, H. Randolph, as assignee of Hugh Hampton, located a valid certificate issued to the said Hampton, on the said land so granted to Russell; and on the Surveyor refusing to survey the land for him, on the ground that the land pointed out and designated by him was covered by Russell's grant, brought this suit to try the right of the said heirs, alleging that it was a part of the public domain of the State of Texas, and subject to be located on by him in virtue of his certificate. The ground upon which the grant is attacked, is, that it was obtained by the fraudulent representations of the grantee, in representing himself as having come to the country with his family, when in truth he was only a transient person, and had not brought his family with him, and that his domicile was in the State of Maine. If the grant was so fraudulently obtained, and without authority of law, it was void *ab initio*, and never passed any title to the grantee, nor separated the land embraced in it from the public domain, and it remained subject to be located upon by any valid certificate. If, however, it was valid when it was issued, it could only be re-annexed to the public domain by forfeiture or by an abandonment of the country. (See *Holliman vs. Peebles*, 1 Texas, 676, and *Hancock vs. McKinney*, 7 Tex. 384.)

We will first inquire, whether from the facts the grantee ever acquired a domicile before or at the date of the issuance of the grant to him. This is a question on which there has been a great deal said, both by foreign and our own jurists. They have, however, agreed upon rules by which the question can be settled. The domicile of a man's birth is presumed to continue until he has selected another, but it is admitted that he can choose another domicile, and that he is not tied down to that of his birth. The evidence of such change of his domicile, or what will amount to such change, is not well defined. No precise time of residence at his new selection has been prescribed as necessary to constitute it as his domicile. If he has selected his new home with the intent of remaining, it would seem on authority to be sufficient, if he is actually at his new home. The intention without having gone there, or the going there without the intention of making it his residence will

not be sufficient. (See Story's Conf. Laws, §§ 44, 47.) The facts are shown to be that the grantee remained in the country from some time in 1834, until August or September, in the year following, and must have been here seven or eight months at least, before the title was extended to him. His declarations and acts all conduced to prove that his determination was fixed and final as to his residence. If he had acquired a residence here at the time of receiving his grant, as we believe, from the evidence he had, and returning to his original domicile, not with the view of remaining, but on business, such return would not forfeit the residence he had acquired here. If, however, when he left Texas for his native domicile, it was with the intent to remain there, he would forfeit his domicile here, and with it, the land acquired would, by abandonment of the country, revert to the public domain. There is no doubt from the evidence, that it was the continued intention of the grantee to return to Texas in as short a time as he could prepare to do so, and that he would have returned without any unnecessary delay, if his design had not been prevented by his early death while preparing to come back. By the Constitution of the Republic of Texas, section 10, it is provided, "All persons, Africans, the descendants of Africans, and Indians excepted, who were residing in Texas on the day of the declaration of independence, shall be considered citizens of the Republic, and entitled to all the privileges of such—all citizens now living in Texas who shall not have received their portion of land in like manner, as colonists shall be entitled to their land in the following proportion and manner. Every head of a family shall be entitled to one league and labor of land, &c." Under this provision it was decided that a married man who was in Texas at the date of the declaration of independence, but had not brought his family with him, but had left them in Mississippi, and afterwards went after them and brought them, was, on proof by facts that it was his intention to remove to Texas, entitled to one league of land and one labor. *The Republic vs. Young, Dal-*lam, 464.

In the *State vs. Skidmore*, 5 Texas Rep. 469, it was held that when the husband was in the Republic at the declaration of inde-

pendence, and returned soon after, and did not bring his family until near three years after, he was entitled to a league and labor of land upon his making proof that it was his intention to make Texas his permanent residence, when here, and to remove his family as soon as he conveniently could; and his wife's bad health accounted for his long delay. In these cases, the intention of the parties when here, without their families, of making Texas their permanent residence, and to bring their families, was construed to mean heads of families at the declaration of independence under the constitution. The principle of these cases is, that constructively their families were with them when the husbands acquired a residence in this country, and the principle is well explained by eminent jurisconsults, both American and foreign, that the domicile of the husband is the domicil of his wife and children. See Story, Conflict of Laws, § 44. The principle upon which the cases of Skidmore and Young were decided, are believed to be decisive of this case. If Russell, the grantee, had acquired a residence in Texas, *animo manendi*; constructively, his wife and children were here, too; because his residence by operation of law would also be their residence. And if he only left his new residence, and returned to his old, for a temporary purpose, either on business or on a visit, it did not annul the new residence; nor could it by his death so happening during his temporary absence, divest his heirs of the title to the land he had acquired as a colonist. The 31st article of the Colonization Law of the 28th April, 1832, is as follows: "Every new settler from the time of his settlement shall be permitted to dispose of his land, although it shall not be cultivated, by testament made in conformity to the laws that are now or shall hereafter be in force, and should he die intestate, his lawful heir or heirs shall succeed him in the enjoyment of his rights of property, assuming in both cases the obligations and conditions incumbent on the respective grantees." The same provision is found in the Colonization Law of 1825, by the same provision, and the Colonization Law of 1825 was not repealed as to Empresario Contracts entered into under it, but such contracts were expressly reserved in the Act of 1832. The conditions to be performed were all subsequent, and before any of

them could be required, to wit: in six or seven months from the date of the concession, a revolution intervened, and the Republic of Texas was established, and all these conditions were abolished, so far as single head right leagues were concerned, by the Act of Congress of 14th December, 1837. This was only the re-enactment of the Act of 1836, December 22, on the payment of the land dues. The record shows that these dues were paid. Hart, Digest, Article 1860. And although the heir may lose his right by a long continued absence and foreign domicile, a reasonable time ought to be allowed him to become a citizen or sell his lands. What this reasonable time should be, may be settled by analogy to the nine years given in subsequent legislation to absent heirs, to become citizens, or to sell the property of their ancestor. The Act of Congress of January, 1840. Hart, Dig. Art. 585, is as follows: "In making title to land by descent, it shall be no bar to a party that any ancestor through whom he derives his descent from the intestate is or hath been an alien. And every alien to whom land may be devised or may descend, shall have nine years to become a citizen of the Republic and take possession of such land, or shall have nine years to sell the same, before it can be declared forfeited, or before it shall be escheated to the Government." It was in evidence that Mrs. Norton, a daughter of Edward Russell, the grantee, with her family, made a crop upon the land in 1842, and have resided in Texas ever since.

The strongest evidence of fraud in procuring the title on the part of Russell, is his representation to the Commissioner in his application for the land. He states that he has come to Texas with his family, a wife and three children, when it is in evidence that his wife and children were not at that time in Texas; and if it was an indispensable requisite of the law, that they should have been actually with him, as a condition upon which title could be extended, it would seem, that it would make the grant void both on account of the fraud and for want of legal sanction. It seems, however, that if he had such family as he describes, that by the usages of the country, and the practice of the Commissioner in extending titles, the family were in law constructively with him. This is presumed



from the fact that the officers did so receive him, and as it was the duty of the Empresario and Commissioner to inquire into the qualifications of those offering themselves as colonists, the presumption, though not conclusive, is that they did not transcend their authority or violate their instructions.

Mr. Hotchkiss, a witness, swears that the grantee lived with him some time at his house at Nacogdoches; swears that the officers who extended titles to him, knew at the time that the wife and children were not actually with him, and that it was usual to issue titles under such circumstances, and that it had been sanctioned by the Attorney General and Assessor General. Mr. Rankin, whose affidavit is in the record, swears the practice to have been the same as proven by Mr. Hotchkiss; and that he had been surveyor in both Austin's and Vehlin's colonies, and that it was usual in both colonies. We have no doubt that in hundreds of cases it was done; the head of the family often preceding his wife and children, and making arrangements here, by selecting and procuring the land, and sometimes making a crop, or building cabins before the rest of the family would be brought out. The evidence of Mr. Hotchkiss was not objected to, and therefore cannot be objected to in this Court, as the instructions of the Assessor General would go to establish not only the practice, but would also tend to prove that it was authorized by the proper authorities; and the case of *Holliman vs. Peebles*, 1 Tex. 676, further confirms the fact of such being the practice of the country, at least. Were we to decide that this practice was a fraud and unauthorized by law, and the title so issued void, we might disturb hundreds of the grants obtained by the early settlers, and deprive them of their lands, for which they had encountered all the peril, toil, and privation to which the early settler was exposed. We believe, however, that if in this case Russell only went back to bring his wife and children, and would have brought them, had it not been for his early death, that his heirs are entitled to the land he had obtained.

The Court was requested, on the trial of this case by the attorney for the unknown heirs, to charge the jury:—"That if they believed from the evidence that Russell, the ancestor of the defendants,

applied for and obtained the grant in good faith, and in good faith went for his family, and died in his efforts to bring them to Texas, in pursuance of the grant, they will find for the defendants;" which charge the Court refused to give. In view of the evidence and the law on which we have commented, we believe the Court erred in refusing to give the charge prayed for.

The Court erred also in overruling the motion for a new trial, on the ground that the verdict was contrary to the evidence.

There is nothing in the grounds stated by the counsel for the appellee, in his motion to dismiss the writ of error in this case. We have no doubt but the attorney appointed by the Court to represent the heirs, had a right to bring the case up for revision.

For the above errors the judgment must be reversed, and the cause remanded for a new trial, in accordance with the opinion given by us.<sup>1</sup>

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#### RECENT ENGLISH DECISION.

##### *Vice-Chancellor Wood's Court.*

##### SCOTT vs. BENTLEY.

1. Where a creditor had been found lunatic in Scotland, and a curator bonorum appointed there—Held, that such curator bonorum has alone a right to sue and give discharges for personal estate of the lunatic, in England.
2. The debtor, not disputing his liability, nor the amount due, but only the right to give a discharge, paid the amount into a bank:—Held, that this was equivalent to a declaration of trust, and that the curator bonorum was right in proceeding in equity.

The question in this case was as to the right of a curator bonorum of a lunatic in Scotland to receive personal estate in England, consisting of arrears of an annuity of 1300*l.*, secured on lands in England, with a covenant to pay the annuity, and a power to the

<sup>1</sup> We are indebted to one of the learned counsel concerned in this case, and are assured that the judgment is of much interest and importance in Texas.—[Eds. *A. L. Reg.*]

grantee to distrain, and further secured by a bond in a penal sum of 1300*l*. The defendant, the personal representative and sole trustee of the will of the grantor, had paid the money into a bank, but insisted on having the most effectual guarantee, viz. that of the Court. The curator thereupon filed this bill to have the arrears handed over to him, and to have the future payments made to him so long as he should continue curator bonorum; and the annuity was dated in 1837, and was duly paid up to April, 1851. The plaintiff was fully appointed curator bonorum, and the opinion of Scotch lawyers was in evidence that nothing could be done there to complete the plaintiff's title, and that in Scotland he would be entitled to receive the money. The annuity constituted the whole of the property of the lunatic, and the sum lying in the bank was only gaining 2*l*. per cent. interest.

*Rolt* and *W. D. Evans*, for the plaintiff.

In a somewhat similar case before Lord Cottenham, when he was asked to order payment of a fund to the curator, he suggested whether payment of the dividends would not be sufficient, which was ordered accordingly. The person appointed, in the country where the lunatic is domiciled, to the care of his estate, must, from the necessity of the case, be able to give a receipt for every part of it connected with personal estate. The argument might be carried also to real estate, but the facts do not require that. As far as the law of Scotland, in a converse case, is of any authority, it is clear in favor of the plaintiff's claim. (*Gordon vs. Lord Stair*, 13 Shaw & Dunl.) [Sir *W. P. Wood*, V. C.—You may put it in this way—that when a curator is appointed, the law executes a power of attorney by the lunatic to him.] *Newton vs. Manning*, (1 Mac. & G. 362); *In re Morgan*, (there cited); and *In re Elias*, (3 Mac. & G. 234), are, so far as they go, authorities in favor of the plaintiff's right. The last case is, as reported, only intituled in lunacy; but the petition must also have been presented in the matter of the Act 3 & 4 Will. 4.

*Daniel* and *G. L. Russell*, for the defendant.

*Rolt*, in reply.

*Feb. 20.*—Sir W. P. Wood, V. C.—The question is, whether the curator bonorum is entitled to sue for personal estate of the lunatic in England. It is singular that there should be in such a case so small an amount of authority. There is, however, one—a case in the House of Lords. And dicta have been not unfrequent which favor the same construction. The case I allude to, *In re Morison*, is nowhere distinctly reported. The committee appointed under proceedings in England in lunacy of the estate of a Mr. Morison, resident in England, sued for personal estate in Scotland. The Court of Session decided against the right of the committee; but it appears that the House of Lords reversed the decision. Lord Hardwicke, in *Thorne vs. Watkins*, (2 Ves. sen. 35, 37), commenting upon the doctrine that personalty has no locality, that all debts follow the person of the creditor and not of the debtor, says, “Therefore debts due to a freeman of London anywhere are distributable according to the custom; and of that opinion I was in *Pipon vs. Pipon*, (Amb. 25). This also came in question in the House of Lords lately, on the lunacy of Mr. Morison; the question was, whether the rule would be the same in the courts of Scotland; and the opinion was, that it would be the same; and that it would be the same in a question between a court of France and a court of England.” Mr. Morison’s case is more fully stated, *arguendo*, by Hill, Serjt., in *Sill vs. Worswick*, (1 H. Bl. 665, 677, 682), which was a case in bankruptcy; there the doctrine is maintained just in the same way. The marginal note is, that assignees in an English bankruptcy may recover from one of the creditors a debt which such creditor had attached and obtained possession of in the Island of St. Christopher. Therefore, putting *Thorne vs. Watkins* altogether on one side, there would be authority to that extent, that a committee appointed in England is entitled to sue in Scotland for debts and assets there; which would go far to show that a curator bonorum appointed in Scotland should have an equal right to sue for and collect debts and assets in England. In *Selkraig vs. Davies* (2 Rose, 98) the judgment of Lord Eldon goes the whole extent of saying, that whatever might be the case as to realty, the English commission clearly passed the personal property in Scotland, and

all other parts of the world. That, again, was in a case of bankruptcy. In *Newton vs. Manning*, (1 Mac. & G. 364), Lord Cottenham seems to be of the same opinion; the petitioner there being appointed in France guardian of a defendant who had become lunatic, his Lordship appears to have said, that if the law of France warranted the proposed dealing with the lunatic's property, the money would be paid. The only analogy opposed to the curator's right in the present case is that from the case of executors; a Scottish personal representative could not, as such, sue here; and it was said that guardians of infants could not. *Beattie vs. Johnstone* (1 Ph. 17,) was cited for the latter position; but in that case Lord Lyndhurst does not say that they have no rights, but he only expresses some doubts as to what their rights are. The case of administration is quite distinct, because that depends upon the authority of the Ecclesiastical Court, and therefore has no analogy with the present case. The analogy is much more near with the case of assignees in bankruptcy, who when appointed here, the act of Parliament vesting all the estate of the bankrupt in them, they are allowed to sue in Scotch courts. I think, therefore, that the curator is entitled to recover this money; and the only question is, whether he is entitled to recover in this suit. As to the form of suit being by the curator alone, it is allowed that he can sue alone in Scotland; and, as in *Morison's case*, it appears that a committee appointed here can sue there just as if appointed there. And as to the proper course being at law, it appears that the money here being deposited at the banker's, amounts to an admission or declaration of trust in favor of somebody—only the person who has the right to give a discharge is in question. The curator, therefore, is right in coming here, and it must be paid to him on his sole receipt. As to costs, it is a new point, without any distinct authority; therefore let the defendant have costs out of the fund, and trustee's costs, for it is a suit to administer the fund.

## RECENT FRENCH DECISIONS.

*Tribunal Correctional de la Seine, (6 Ch.) 1854.*

MARCHI vs. SAMSON ET AL.

1. The copying of a statuette by means of the daguerreotype or other photographic apparatus, and the use of the stereoscope to give relief to the copies thus made, to the injury of the owner of the original work of art, is an infringement of his copyright.

The following is in substance, the judgment of the Court in this case :—

An idea, and its embodiment through the means of any art whatever, are the property of its author.

The reproduction of a work of art, in whatever manner, and whatever process and material its author may have employed, constitutes an unquestionable breach of copyright, when made without the assent of the original author of the artistic work, or his assigns. Such a reproduction is of a nature to injure the rights and interests of the author, by vulgarizing his work, and consequently diminishing its artistic and commercial value.

In the present case, Marchi has established his property in the entire productions of the late Pradier, and on this title he has the right and interest to prosecute for the suppression of an infringement which operates to his injury. It has been proved on the trial, that Samson, Deschamps and Bertrand have infringed his copyright, by taking impressions on daguerreotype plates, or on paper, from the statuettes of Pradier, of which Marchi is proprietor, and by giving relief thereto, with the stereoscope; and that Gandin, Dubosc and Montfort, have retailed these imitations. They have thus besides the commission of the unlawful act itself, caused an injury to Marchi, which the Court has before it sufficient materials to estimate.

The Court, therefore, applying to Samson, Bertrand, Gandin, Dubosc and Montfort, articles 425, 26, 27, of the Penal Code, imposes on Bertrand, Samson and Deschamps, a fine of 100 francs each; on Gandin, a fine of 200 francs, and on Dubosc and Montfort,

one of 100 francs each, fixes the amount of pecuniary separation due to Marchi, at 4,000 francs, and condemns the defendants jointly and severally, to pay that sum ; directs an imprisonment of two years ; orders the insertion of this judgment in two newspapers, at the option of Marchi, and decrees the confiscation of the articles seized.

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*Cour Impériale de Paris. (1 Ch.) 20 Dec., 1853.*

MALGAIGNE vs. DE SAINT PRIEST.

1. The editor of a collective work, has the right, even in the absence of any special agreement, to make such changes and suppressions in the articles of contributors, as he may judge proper, so long as those changes and suppressions do not affect the plan and idea of the original.
2. The task of correcting for the press, the proofs of articles in such a work, belongs to the editor.

This was an appeal from a decision of the *Tribunal de Commerce de la Seine*, reported 1 Am. Law Register, 42, where the facts are stated. That decision is reversed by a decree, the substance of which is as follows :

In undertaking the preparation of the article, "*Médecine*," for the *Encyclopédie du XIX Siècle*, Malgaigne, even in the absence of any special agreement to that effect, submitted himself implicitly to the control of the editor. In making certain changes in this article, De Saint Priest was only exercising a right, though it might perhaps have been more courteous in him to have entrusted the author himself with this task. The plan and idea of the original article have, however, been scrupulously preserved. The duty of the editor of the *Encyclopédie* has been properly performed, and the changes introduced by him in the article, in order to adapt it to the general tone of the work, have not in anywise altered its character.

On the other hand, the corrections for the press ought properly to be made by the principal editor in the case of a work collectively prepared by a number of persons ; and this is a custom generally followed.



The other contributors to the *Encyclopédie*, have submitted to it, and have recognized the right of control of the editor, by their approval of the modifications made by him in their articles.

The decree below is reversed.

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### ABSTRACTS OF RECENT AMERICAN CASES.

*South Carolina Court of Appeals, May sittings, 1855.*

The following is an abstract of some of the decisions of the Court of Appeals in Equity :

*Church of the Advent vs. Farrow and wife* : Appeal from a decree of Chancellor Johnston, at Spartanburg. Opinion delivered by Wardlaw, Chancellor.

A subscription was drawn for contributions, in money, to erect the church. I. H. subscribed "*fifty dollars, and the lot to build on.*" No lot was laid off, nor were any steps taken in building during his life. At his death, part of his land fell to his daughter, Mrs. Farrow. The bill was to compel her and her husband to convey an acre, at a particular locality on this tract as a site for the church. HELD, that the writing was defective, under the statute of frauds, in not identifying by description, either the extent, or location of the premises intended to be given ; and that the defect could not be cured by parol proof. *Decree affirmed.*

*Boulware vs. Witherspoon* : Appeal from a decree of Chancellor Johnston, at Lancaster. Opinion delivered by Johnston, Chancellor.

Contest between creditors of one Rains, for the application of a fund, in Court, to their respective demands, existing in the form of executions. The Bank of the State held the oldest executions, and claimed priority of right ; and it depended on the amount still due on those executions, whether any portion, or what portion, of the fund should go to the other contesting creditors.

Among the executions of the Bank against Rains, were some against him as endorser for one Goin. The Bank, holding correlative executions against Goin for the same debts, caused Goin's land in this State to be sold by the Sheriff, and credited the proceeds on the executions against him ; and also entered credit, *pro tanto*, on the executions against Rains as endorser. The Bank afterwards followed Goin to Florida, whither he

had carried his personal property, and compromised their claims with him for the balance due by him. HELD, that this compromise did not invalidate the right of the Bank to retain the money they had previously received from the sale of Goin's land, nor did it entitle the contesting creditors to have that money transferred to the credit of the Bank's execution against Rains (for debts due in his own right,) so as to diminish the amount on them.

At the sale of Goin's land the Bank purchased through an agent. It was alleged that at the sale, the agent had held out promises that if the Bank became the purchaser it would allow Goin or his creditors, the benefit of any re-sale it might make. It did make a re-sale at a considerable advance. HELD, that the right to enforce this agreement, or to treat the transaction as a fraud, was concluded by Goin's subsequent compromise; and the creditors of Rains, his creditor, were not competent to complain. Such a circuitry of remedy is not consistent with the practical administration of justice. HELD, further, that the evidence of the agreement was too vague.

Anterior to the 1st of January, 1849, Rains placed in the Sheriff's hands about \$3,000, and took his loose receipt to apply the money to executions in his hands against said Rains. On that day (1st January, 1849) there was found, exclusive of the proceeds of Goin's land, a credit endorsed on the executions against Rains for a sum exceeding that for which the Sheriff had receipted; and there was no proof of any other money having been paid in by Rains. HELD, that in the absence of such proof, it was a justifiable presumption that the money receipted for entered into this posterior credit. If the contesting creditors would have this latter money entered as an additional credit, the burden was on them to show an amount received by the Sheriff from other sources, sufficient to account for the credit he had entered, without resorting to the sum covered by the receipt. *Decree affirmed, Wardlaw, Ch. dubitante.*

*Bivingsville Man. Co. vs. Bivings*: Appeal from decree of Chancellor Johnston, at Spartanburg. Opinion delivered by Johnston, Chancellor.

Complainants had employed the defendant as their agent, and after several years' service, came to a settlement with him, gave their note for the balance due him on account, and discharged him. Afterwards, suspecting that there were mistakes against them in the settlement, they brought their bill for a fresh accounting, but specified no errors in the account that had taken place. On the account being gone over, it was found that the inaccuracy of the settlement was against the *defendant*. HELD, that he was entitled to a decree for the additional balance thus established.

In excepting to the Commissioner's report, the complainants pointed out no specific errors. HELD, that the exceptions were defective. It is the function of an exception to designate the very point where an error exists in the report so as to enable the Court to put its finger on it and correct it, by a judgment confined exactly to that point.

When an opportunity to except is presented and the party, while excepting, omits some grounds which he might have taken, or excepts insufficiently, his privilege is waived and lost; and he cannot, at a future stage of the suit, avert the consequences of his neglect by putting in additional exceptions.

The bill in this case was filed in 1844, but the complainants had not prosecuted the accounting to a result before 1853. At the sittings in that year a report was made which set forth a balance against them. One of their counsel, who had attended the reference, was then dead. Omitting to move for a re-opening of the reference on account of his decease, they put in exceptions to the report. An order was made, at their instance giving them time to complete and argue the exceptions before the Commissioner. After they had done so, and their exceptions were over-ruled by the Commissioner, they moved, in 1854, to set the report aside, and for leave to investigate the account *de novo*; alleging that the death of their counsel had deprived them of a proper knowledge of the matters reported. HELD, that parties undertaking to allege mistakes or errors in their bill, must be presumed to know where the errors exist, and are bound to make good their charges; and (possessing this knowledge,) the death of their counsel is not sufficient reason for a new investigation. HELD also, that having omitted to move for a re-investigation when the report came up in 1853; but, instead, having moved for leave to complete and argue their exceptions, their right to make such a motion in 1854 was lost. HELD, further, that in a case depending for ten years, in which there was, at the outset, no designation of errors in the bill; when the complainants had so long neglected to bring an accounting intended for their benefit to a result; and when, after so great a lapse of time, they professed to remain in the same state of ignorance respecting the true state of the account as when they began their suit, there was no reason for delaying the final judgment at their instance. Delays are not to be encouraged; when voluntary, they are censurable. *Decree affirmed.*

*McKorkle vs. Black*: Appeal from Chancellor Dargan, at Marion. Opinion by Dargan, Chancellor.

Devise of land to two or more persons, to be equally divided among

them "to them during their lives, and, after their death, to their lawful issue," followed by a provision that, if any of said devisees should "die, leaving no lawful issue, the portion or portions of him or her, so dying, shall be equally divided among the survivors." HELD, that the first takers, or devisees, named in the direct devise, took only a life estate, with remainder to their issue, as purchasers. *Treville vs. Ellis*, Bail. Eq. 110 commented on, and approved. *Decree affirmed.* Johnston, Ch. *dubitante.*

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### NOTICES OF NEW BOOKS.

Brightly's Purdon's Annual Digest for 1854, 1855. Annual Digest of the Laws of Pennsylvania for each of the years 1854 and 1855. By Frederick C. Brightly, Esq. Philadelphia: Kay & Brother, Law Booksellers and Publishers. 1855.

Mr. Brightly's Purdon has been found to be the most satisfactory digest of our laws that has been presented to the profession. It is equally meritorious in its plan and in its execution. This supplement is like the one of last year, and is upon the same plan as the body of the Digest. The arrangement is alphabetical, with a new index, comprising all the laws of both 1854 and 1855. The most important feature is this index, which at a glance gives all the legislation of the two years at one view, with a reference to the pages in each annual number. We have also the usual and highly useful marginal references, foot-notes of decisions, &c. The plan and execution seem to leave little further to be desired.

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A Monograph on Mental Unsoundness. By Francis Wharton. Philadelphia: Kay & Brother. 1855. pp. 228.

This pamphlet forms the first book of a volume on Medical Jurisprudence, now in press by the learned author, aided by and in connection with Dr. Moreton Stillé, of this city. It is seldom we are called upon to notice a law book which possesses so deep an interest to the scholar and thinking man, not only in law, but in all professions and pursuits. Never before in the English language has the subject of mental unsoundness received so careful, so thorough, so elaborate, so useful and so interesting a presentation, legally, morally and psychologically. We can only send our readers to the book itself, promising them a few hours of curious and deeply interesting study.

**An Analytical Digest of the Reports of cases decided in the English Courts of Common Law, Exchequer and Exchequer Chamber, and Nisi Prius, in the year MDCCCLIV, in continuation of the annual digest by the late Henry Jeremy, Esq., Barrister at Law. By William Tidd Pratt, of the Inner Temple, Esq., Barrister at Law. Arranged for the English Common Law and Exchequer Reports, and distributed without charge to subscribers. Philadelphia: T. & J. W. Johnson, Law Booksellers, Publishers and Importers, No. 197 Chestnut Street. 1855. pp. 73.**

This unpretending pamphlet will not be found without its value. In the compass of a few pages we have the substance of the decisions of the English Common Law tribunals, arranged and digested, and the time and labor expended in turning the leaves of several volumes can be wholly dispensed with, and their contents fully and easily presented.

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**English Reports in Law and Equity, embracing the reports of cases in the House of Lords, Privy Council, Courts of Equity and Common Law, and in the Admiralty and Ecclesiastical Courts, including cases in Bankruptcy and Crown cases reserved. Edited by Edmund H. Bennett and Chauncey Smith, Counsellors at Law. Vol. XXVI. Boston: Little, Brown & Company.**

We deem no other notice than a simple announcement of this volume necessary. The series is universally known and generally used by the profession in every section of the country. It opens a cheap and easy access to all the later English decisions in all the principal tribunals; and its ready reception and extensive sale show that the profession fully appreciate the work.

THE  
AMERICAN LAW REGISTER.

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AUGUST, 1855.  
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OPINION OF THE ATTORNEY GENERAL OF THE UNITED  
STATES ON THE PURCHASE OF BELLIGERENT SHIPS BY  
CITIZENS OF THE UNITED STATES.

ATTORNEY GENERAL'S OFFICE, }  
7th August, 1854.

SIR: Your letter of the 2d instant, communicating to me that of Mr. Crampton, the minister of Great Britain, calls for my opinion as to the actual state of the laws of the United States in regard to the following points:

“1st. With respect to the purchase, by citizens of the United States, of foreign ships of a belligerent power, more especially when such purchase is made in the ports of a third neutral country.

“2d. What documents a foreign ship, so purchased, must have on board, and with what formalities such ship must have complied, in order to entitle it to hoist the flag and enjoy the privileges of the country to which it has been transferred, especially before such vessel has entered the ports of such country.

“3d. What precautions are required by the law to secure the *bona fide* character of such transactions, and to prevent the neutral flag from being fraudulently used to cover ships, which are either the property of a belligerent, or are not the exclusive property of United States citizens.”

For the purpose of satisfactorily replying to these questions, it will be necessary, not only to exhibit the actual state of the municipal law of this country, but also to show how far that law is founded on, and accords with, the law of nations. And the most convenient mode of doing this will be to begin with investigation of the principles of the public law as to the nationality of merchant ships in general, with more especial reference to the purchase, by neutrals, of the merchant ships of a belligerent.

Some publicists have denied that a ship must of necessity belong to any particular nation, and have assumed that it may belong to several nations or to none (Pinheiro-Ferreira, *Manuel du Citoyen*, tom. ii. p. 603); and that it is permissible to any body to navigate the sea, *etiam a nullo principe impetratâ licentiâ*. (Grotius *de Jure Belli ac Pacis*, ch. 5.)

I do not affirm or even admit such doctrine. I hold it impossible, legally speaking, that the property of any man should be without nationality, unless, possibly, in the exceptional case of the uncivilized occupants of some petty islet in the Pacific or Indian sea, or some barbarous tribe of Asiatic or African savages beyond the pale of international law. Such a pretension is inadmissible by the law of nations, because contrary to the very nature of man, which seeks sociality of relation, and because, unless men be grouped into political societies, there can be no guaranty of law, nor assurance of positive and effective authority. Such a pretension is least of all admissible in regard to the navigation of the ocean, the extent of which, and the inherent difficulty of subjecting it to a continuous and complete *surveillance*, create a peculiar exigency for bringing all ships, and those owning or navigating them, within the scope of some nationality, with a consequent responsibility to law, both public and municipal, which are unattainable without such nationality. (Ortolan, *Diplomatie de la Mer*, tom. i, p. 178.)

The law of nations, and common sense combine to require that every ship shall have a nationality, defined and evidenced in each case according to the municipal law of the particular nation to which the ship appertains.

Different states of the great republic of Christendom have estab-



lished different rules, according to the policy of each, by which to determine nationality of character. The conditions of distinction concern the ship, as whether constructed or not in the country, and the owners, officers, and crews, as whether domiciled in the country or not. In selecting and combining among these ingredients of national character, governments have applied more or less of rigor, according to their respective conditions. Great Britain and the United States, and in general, those countries which conceive themselves to possess elements of maritime power, and are ambitious to develop those elements, have attached particular privileges of legal capability to ships constructed in the country, and owned and manned by its citizens, or domiciled inhabitants, without absolutely excluding the purchase and ownership of vessels of foreign construction. Local laws of this class, and their consequences, are fully recognized by numerous international conventions, as well by the general public right, of all the states of Europe and America. (Ortolan, *ubi supra*, lib. ii, ch. 9.)

But there is nothing in the law of nations, which requires that a ship, in order that she may enjoy all the benefits of nationality, should have been constructed in a particular country, or which negatives the general right of a nation to purchase and to naturalize the ships of another nation.

On the contrary, the laws of Spain, Portugal, Austria, or other countries of continental Europe, and of most of the new states of America, have long permitted the purchase of foreign ships, and admitted them, under certain conditions, to the right, and to the correlative duties, of complete naturalization. (Hautefeuille, *Droits et Devoirs des Nations Neutres*, tom. iv, p. 80 ; Ortolan, *ubi supra*, tom. i., p. 184, note) ; and such at the present time, but of recent introduction, is the law of Great Britain. (Act of 12 and 13 Vict. ch. 29.)

Since the public treaties, which make stipulations as to the conditions of existence and the means of proof of the nationality of merchant ships, either refer to the laws of each country on this point, or in some cases adopt and repeat them, it follows that the positive laws of this class, peculiar to each state, enter into the domain of

international right, and compose integral parts thereof. (Ortolan, *ubi supra*, tom. i, p. 202.)

This doctrine covers the purchase and naturalization of ships, not less than the other sub-divisions of the general subject matter.

Thus, by the treaties between France on the one side, and the republics of New Grenada and Bolivia, on the other, it is agreed to admit reciprocally, as national, all ships, wheresoever constructed, which are, in good faith, the property of the respective citizens of the contracting states.

So, also, the United States, in favor of nations deficient in maritime resources, have in several instances agreed that a ship, the *bona fide* property of, and commanded by, a citizen of the country, shall be deemed national, though her construction and her crew be foreign, as in the cases of Venezuela, Peru, Bolivia and Ecuador.

On the other hand, in other treaties we have refused to concede nationality, so far as regards privileges of commercial reciprocity, unless to ships of home construction, as in the case of Hanover.

The general principles, thus explained, apply alike to the proof and to the facts of nationality. Each nation has the right to prescribe for itself convenient rules on this point. Belligerent nations have sometimes undertaken to impose their own regulations upon the neutral. (Abreu, *Tratado de Presas*, chap. 5, s. 3, no. 2,); but their pretensions in this respect are now almost universally denied; for the neutral owner is rightfully subject only to the laws of his own sovereign. (Valin, *Comment. sur l'Ordonn. de la Marine*, art. v, tit. 9, t. 8; Martens, *Des Armateurs*, ch. 2, s. 21, note *m*; Massé, *Droit Commercial*, tom. i, l. ii, ch. 2, s. 2, a. 5, no. 809; Hautefeuille, *ubi supra*, tom. iv, p. 24; Rayneval, *De la Liberté des Mers*, tom. i, p. 76.)

This question is one of evidence only. The belligerent is not to be defrauded by simulated nationality and neutrality. On the other hand, the belligerent cannot be suffered to dictate arbitrary means of proof. And there is no serious difficulty on this point, as we shall see hereafter; because the rules of evidence and of logical proof, are in substance, the same in all parts of Christendom.

It remains only to consider how far, if at all, the right which the law of nations concedes to each country, of determining, for itself,

the conditions of the nationality of merchant ships, is modified by the state of war.

It is true, that the prize regulations, occasionally issued by some belligerent nations, have undertaken to prescribe a limitation, in time of war, of the right to purchase, naturalize and neutralize foreign ships, to the effect, that in order to exempt from capture, in the hands of a neutral, a merchant ship purchased from the belligerent, it must be shown that she was so purchased before the existing war, or else after capture and lawful condemnation. (Hubner, *De la Saisie des Batimens Neutres*, tom. i, pt. 2, ch. 3, s. 10, no. 4.)

France, by the prize regulations of July 23d, 1704, art. 7, (Lebeau, *Nouveau Code des Prises*, tom. i, p. 332,) and by those of July 26th, 1778, art. 7, (Lebeau, tom. iv, p. 342,) enacted that no vessel of enemy's construction, or which had been at any time of enemy's ownership, should be reputed neutral, without proof that the sale or cession of them to the neutral owner, was made before the commencement of hostilities. (Merlin, *Répertoire*, *Prise Maritime*, s. iii, art. 3, p. 144).

Russia, on the other hand, at all times just in her appreciation of neutral rights, has, in her wars with Turkey, where the question is a practical one, admitted that a ship of belligerent construction, when it has become the property, *bona fide*, of a neutral, though purchased by him after the commencement of war, is not subject to molestation. (Hautefeuille, *ubi supra*, tom. iv, p. 28, note.)

The injustice and unreasonableness of making any distinction, in this respect, between ships and any other species of property, was long since indicated, (Lampredi, *del Commercio dei Popoli neutrali in Tempo di Guerra*, pt. i, s. 12, not.); and this belligerent encroachment on the sovereignty and the rights of neutrals, notwithstanding that it continues to be asserted by some states, is rejected by the most authoritative writers on the public law of Europe. (See Hautefeuille, *ubi supra*, tit. xi, ch. 2).

The exercise of commerce by every nation is one of the incidents of its sovereignty. The sovereign rights of a particular nation are not to cease whenever any two other nations choose to go to war. The neutral state is to conduct impartially between the belligerents,

but its commerce remains free, with respect to them, and to each of them ; that commerce is without limitation, saving only the restrictions as to contraband of war, and places besieged, blockaded or invested ; and thus restricted, it extends in principle to all the possible objects of mercantile intercourse.

No government has a right to contest the validity of the sale of a ship, on the pretence of its having been, at one time, belligerent property. To undertake to do this, is to usurp a jurisdiction over the business of other nations ; it is to derogate from their independence ; it is a mere abuse of force, which a strong nation may impose on a weak one, but which every strong nation should indignantly repel as it repels the pretension of the exclusive dominion of the sea by any one state.

The assumed right of a belligerent to annul sales of its enemy's ships to neutrals, is founded on the allegation that some of such sales may be simulated and fraudulent. But the fear of collusion is applicable to other property as much as to ships. And if the assumed consequences be admitted, then it follows that all goods, of the growth or produce of a country at war,—nay all other goods which have, at any time, in the progress of the war, belonged to that country,—are subject to capture and condemnation in the hands of the neutral nation ; and we are thus brought to the precise state of things which produced the last war between Great Britain and the United States.

That this is the inevitable tendency of the doctrine is made plain by inspection of the adjudications on this point, in the admiralty Courts of England, which fully recognize the soundness of the position that no distinction in this respect, can be made between ships and other objects of ownership and of commercial exchange.

In a very recent publication on the law of nations, the author, speaking of his own country, says : “ It cannot be denied that the common law of England has hitherto been, to a certain extent, like the territory in which it prevails, of an insulated and peculiar character.” (Phillimore, *International Law*, pref. p. xi.) That is true, and serves, in part, to explain the fact that no Grotius or Vattel has yet appeared in England, and that the work of highest

authority on the law of nations, in the English language, was written by an American, (Wheaton). The so called "Treatise on the Law of Nations" by Chitty is but a compilation of the "insulated and peculiar" belligerent code of England.

Within a few years, however, the study of the law of nations, with higher and broader views, in England, is evinced by the publication of the works of Wildman, Reddie, Polson, Manning, Phillimore and others.<sup>1</sup> Each of these works, of course, has its merits; and that of Wildman particularly so; but none of them can be received unreservedly, as authority, because none of them are exempt from the bias of local law, foreign policy, pretensions or purposes of Great Britain.

We, in the United States, of the legal profession, cannot be charged with any want of respect for the courts and the jurists of England; on the contrary, their municipal law is, in the substance, our own, and we receive their decisions, on points of the common law, and of equity, and of local admiralty law, and read their books, with the same deference, as if they possessed legal authority among us. But, the moment we pass beyond the limits of mere municipal law, this relation of the jurisprudence of the two countries undergoes change. Then we perceive that our entire political history, nay, our very existence as a people constitutes a permanent and solemn protestation against the public law of England, her prize code, and what some of her jurists are pleased to conceive and write of, as the law of nations. We are constrained to observe the fact, that the doctrines of public law, received in Great Britain, especially regarding maritime rights, are not seldom in conflict with prevalent notions in all the rest of Europe. Of course, those doctrines are not entitled to conclusive authority as law, or paramount weight of consideration, with us; nay, they require to be watched with distrust, as being, perhaps, devices of peculiar national policy, rather than received truths of universal justice and right.

I recognize, with gratification, however, that, on this particular subject, the local law of Great Britain approaches to, if it does not

<sup>1</sup> Since the preparation of this opinion, a comparatively large number of works of circumstance on branches of the maritime law, have appeared in Great Britain.

absolutely reach, the rules of general reason. It is correctly stated by Wiseman, almost in the words of Lord Stowell, as follows :

“The title of neutral vendee to a merchant vessel, sold by the enemy in time of war, is valid, where the property is *bona fide* and absolutely transferred, so as to divest the enemy of all future interest in it. There have been cases of merchant vessels driven into ports out of which they could not escape, and there sold, in which, after much discussion and some hesitation of opinion, the validity of the purchase has been sustained. But a belligerent is justified in enforcing such rules, as reason and common sense suggest, to guard against collusion, and to enable it to ascertain as much as possible that the enemy's title is absolutely and completely divested. \* \* \* Anything, tending to continue the interest of the enemy, vitiates the contract altogether : to be valid, the sale must be absolute and unconditional. \* \* \* When a vessel is purchased from the enemy, by agents in the enemy's country \* \* \* it must be shown by proper documents that the agent was legally authorized to make the purchase.” (International Law, vol. iii, pp. 89, 90. See the cases of *The Sechs Geschwistern*, 5 C. Rob. 100; *The Minerva*, 6 C. Rob. 399; *The Argo*, 1 C. Rob. 158.)

This text book, and the adjudications on which the text is founded, concur in opinion, that the only question to be investigated, in the case of a neutral ship, purchased from the belligerent, is the *bona fides* of the transaction. That is undoubtedly the rule. (Kluber, *Droit des gens*, s. 243; Rayneval, *Droit de la Nature et des Gens*, l. iii, ch. 14, 15.)

But a *dictum* of Lord Camden's, that a ship cannot change her character *in transitu*, and which has been expanded by Lord Stowell into a body of doctrine, cannot be suffered to pass without challenge, because, instead of investigating the question of *bona fides* in a case of sale *in transitu*, it assumes the fact of such sale, whether of ship or goods, as conclusive evidence of *mala fides*. (The *Danckebaar Africaan*, 1 C. Rob. 108; the *vrow Margareta*, 1 C. Rob. 376; the *San Frederick*, 5. C. Rob. 129; the *vrow Anna Catharina*, 5 C. Rob. 161; the *Abby*, 5 C. Rob. 251.) I am not aware that the doctrine has received the formal sanction of the courts of

the United States. It is referred to with approbation, on two occasions, by Mr. Justice Story, (the *Ann Green*, 1 Gall. 274–291; the *Francis*, 1 Gall. 445–449;) but those allusions were dicta merely in argument, not called for by the decision in either case; and when, afterwards, one of the cases came before the Supreme Court of the United States, it appeared that there was no actual sale of the property in dispute, but only an unexecuted purpose of selling, and, of course, no question was made as to the effect of a sale *in transitu*. (The *Francis*, 8 Cranch, 359.) It remains a debatable point for consideration hereafter, if it should ever be raised before the Supreme Court.

This doctrine seems to be a remnant of the old theory of maritime prize, which assumed that a belligerent has a vested right by the declaration of war in all sea-borne private property of the other belligerent; that no such property can be the subject of lawful sale; that all contracts of sale touching belligerent property of any sort, though valid on land, yet are invalidated by the mere fact of such property being embarked on the ocean; that, in questions of maritime prize, all presumptions are in favor of the captor and against the captured; and that the neutral, as well as the belligerent, under which he claims, is to be assumed to be guilty of collusion and fraud in every commercial transaction.

This theory, in all its parts and relations, can no longer be admitted as the law of nations, still less as the law of the United States.

It cannot be repeated too frequently, that, upon the received and only true principles of public law, possession of property is presumption of ownership; that the belligerent who claims to take property from the neutral as if belligerent property, must prove his right so to do; that if he imputes wrongful neutral possession and *mala fides* in a contract of purchase and sale, he must prove it; that the state of war interrupts no contract of purchase and sale, or of transportation, as between neutral and belligerent, except in articles contraband of war; in a word, that neutral commerce, whether of ships or other things, except in regard to contraband of war and places invested, is just as free in war as in peace. Certainly, if judicial



conviction, positive law, and international policy, have not yet reached this point, they are tending, irrepressibly, towards it, both in Europe and America.

I doubt the soundness, therefore, of the assumed rule, that the mere fact of the sale of property by a belligerent to a neutral *in transitu*, is to be taken as proof, or even as presumption, of collusion and fraud. It may be cause of suspicion, without justifying conviction.

It remains only to consider how these questions are affected by acts of Congress.

The statutes of the United States recognize the following classes of sea-going vessels, namely:

1. Ships built in the United States, wholly owned by citizens thereof, employed in foreign commerce, which are entitled to be registered, and as such to enjoy all the rights and privileges conferred by any law on ships of the United States. (Act of December 31st, 1792, Stat. at Large, vol. 1 p. 287.)

Such a ship, of course, loses her privileges as a registered ship, in being sold to a foreigner, and is thereafter treated forever as foreign built, even though she be purchased back by the original owner or any other citizen of the United States. (Opinion of Attorney General, MSS., March 16th, 1854.)

2. Vessels built in the United States, and wholly owned by citizens thereof, employed in the coasting trade or fisheries, which are entitled to be enrolled and licensed as such, and to enjoy all the privileges, in their particular employment, conferred by law on vessels of the United States. (Act of February 18th, 1793, Statutes at Large, vol. 1, p. 305.)

3. Ships built in the United States, but owned wholly or in part by foreigners, which are entitled to be recorded, but not in general to be registered or enrolled and licensed. (Act of December 31st, 1792, *ubi supra*.)

4. Ships not built in the United States, but owned by citizens thereof: of which, more in the sequel.

5. Ships built out of the United States and not owned by citizens thereof.



6. Special provisions exist, in regard to the steamboats belonging to companies engaged in the transportation of ocean mails, as well as in regard to those navigating the bays and rivers of the country; which provisions relax the registry or enrolment laws, so as to admit ownership, under certain regulations, of persons not citizens of the United States.

The registry and enrolment statutes of the United States are in imitation of those of Great Britain *in pari materia*, and for the same objects, namely, to promote the construction and ownership of ships in the country, and to facilitate the execution of local or public law. They are classified with reference to the business they may pursue; their character is authenticated; and they enjoy various advantages, from which other vessels are wholly excluded, or to which these are partially admitted, according to the interests and policy of the government. (Abbott on Shipping, p. 58.)

It is with vessels of the fourth of the above classes, that we have more immediate concern.

It is observable, in the first place, that there is nothing in the statutes to *require* a vessel to be registered or enrolled. She is entitled to registry or enrolment, under certain circumstances, and, receiving it, she thereupon is admitted to certain duties and obligations. But, if owned by a citizen of the United States, she is American property, and possessed of all the general rights of any property of an American.

Secondly, the register, or enrolment, or other custom house document, such as sea letter, is *prima facie* evidence only, as to the ownership of a ship in some cases, but conclusive in none. The law even concedes the possibility of the register or enrolment existing in the name of one person, whilst the property is really in another. Property in a ship is a matter *in pais*, to be proved as fact by competent testimony like any other fact. (*U. S. vs. Pirates*, 5 Wheaton, 187, 199; *U. S. vs. Amedy*, 11 Wheaton, 409; *U. S. vs. Jones*, 3 Washington's C. C. R. 209; *Taggard vs. Loring*, 16 Massachusetts R. 336; *Wendover vs. Hogeboom*, 7 Johnson, 308; *Bass vs. Steele*, 3 Washington's C. C. R. 381; *Leonard vs. Huntington*, 15 Johnson, 298; *Ligon vs. New Orleans Nav. Co.* 7 Mar-

tin's R., new series, 678; Condensed Rep. vol. 4, p. 899; *Brooks vs. Bondsey*, 17 Pickering, 441.

To the same effect is the cause of adjudication in Great Britain. (See *Neustra Señora de los Dolores*, 1 Dobson, 290; *Robertson vs. French*, 4 East, 130; *Young vs. Brander*, 8 East, 10; *Frazier vs. Marsh*, 13 East, 238; *McIver vs. Humble*, 16 East, 174; *Frazier vs. Hopkins*, 2 Taunton, 5; *Sutton vs. Buck*, 2 Taunton, 302; *Smith vs. Fuge*, 3 Campbell, 456; *Recuss vs. Myers*, 3 Campbell, 475; *Fowler vs. Young*, 3 Campbell, 240; *Pirie vs. Anderson*, 4 Taunton, 652; Abbott on Shipping, p. 91.)

Thirdly, in regard to the condition of a vessel owned by an American, we adopt the law as it stood in Great Britain prior to the relaxation of her navigation system by the act of 12 and 13 Victoria, to the effect, that the only object of registry or enrolment is to confer certain privileges under the navigation and revenue laws. A foreign built unregistered ship might, even before the above mentioned act, have been owned by a British subject, and employed by him in any trade not interdicted to alien or other unregistered ships; but is meanwhile entitled to protection as the property of an Englishman. (*Long vs. Duff*, 2 Bos. & Pul. 209.)

This case, to be sure, is of a decision under the old registry acts; but it does not appear that any change, in this respect, is produced by the several registration acts codifying the old ones, passed in the successive reigns of George 3, George 4, William 4, and Victoria.<sup>1</sup> For the cases of *Palmer vs. Moxon*, 2 M. & S. 43, *Dixon vs. Ewart*, 3 Merivale, 322, and *Bergson vs. Gibson*, 4 Man., Gr. & Scott, 120, applied only to vessels registered as British, and claiming the privileges consequent on registry. There might, of course, be valid sale of an alien ship without registry, as also of a ship not pretending any right to registry, though British property. This conclusion follows from the case of *Benyan vs. Cresswell*, in which it was well argued, that there is nothing in those acts to compel registration; that it is only the means of obtaining certain benefits, some of which are attainable without it; and that it is a matter of choice with the owner whether to obtain registry or not; which reasoning was adopted

<sup>1</sup> This was written prior to the Act of 17 & 18 Victoria, c. 104, which is of August 10th, 1854.

by the court of Queen's Bench. "It was not necessary," says Lord Denman, "that there should be any registration at all." (*Benyan vs. Cresswell*, 12 Ad. & E. 899.)

Most of the cases above cited are, it is true, not of decisions as to national character *ex nomine*; but the doctrine established applies to both points; it having been adjudged that a register is not a document required by the law of nations, as expressive of a ship's national character. (*Le Cheminant vs. Pearson*, 4 Taunton, 367.)

The whole doctrine is fully and fairly stated by Greenleaf, the best authority on the law of evidence, as follows:

"The registry of a ship is not \* \* a document required by the law of nations, as expressive of the ship's national character. The registry acts are considered as institutions purely local and municipal, for purposes of public policy. The register, therefore, is not of itself evidence of property, except so far as it is confirmed by some auxiliary circumstance," &c. (Greenleaf's Evidence, vol. i, s. 494.)

It could not be otherwise decided, because numerous commercial treaties, between European or American states, make express stipulations as to proof of nationality, without requiring this to be done by register and enrolment; and as hereinbefore explained, there is no absolute rule of the law of nations, prescribing the evidence either of ownership or of national character, although the most common proof of national character is by passport or sea letter. (Hautefeuille, *Nations Neutres*, tom. iii, p. 450, tom. iv, p. 23.)

Finally, the act of Parliament of 12 and 13 Victoria, ch. 29, repeals so much of 8 and 9 Victoria, or of any other act, as provides that no ship shall be registered, except such as are wholly of the build of some part of the British dominions, and makes complete provisions for the registration of foreign built vessels, the property of subjects of Great Britain. There is nothing in this act, of course, to confine the right of purchasing foreign built ships to the time of peace, or to prevent the purchase of belligerent ships, as previously authorized by law, according to the decisions of the admiralty, and other courts of the kingdom.

This act to regulate the general condition of ships in Great Bri-

tain, and the measures regarding neutral commerce adopted by the British government, at the opening of the present war in Europe, contribute to show the modifications, which its laws and its policy have undergone of late years, on these points, greatly in its own interest, as well as in that of the peace and harmony of Europe.

This government has not, as yet, followed the example of that of Great Britain, so far as to admit foreign built vessels to registry; but such vessels may be lawfully owned by Americans.

Upon full consideration, therefore, of all the relations of the subject, there remains no doubt, in my mind, as to the right of a citizen of the United States to purchase a foreign ship of a belligerent power, and this, anywhere, at home or abroad, in a belligerent port, or a neutral port, or even upon the high seas, provided the purchase be made *bona fide*, and the property be passed absolutely and without reserve; and the ship so purchased becomes entitled to bear the flag and receive the protection of the United States.

As to the two secondary questions in Mr. Crampton's letter, namely, what documents a foreign ship, so purchased, must have on board, and what formalities she must have complied with, especially if transferred abroad, and what precautions are made requisite by law, to secure the *bona fide* character of the transaction:—

Lord Stowell has well said, that "A bill of sale is the proper title to which the maritime courts of all countries would look. It is the universal instrument of the transfer of ships in the usage of all maritime countries." (*The Sisters*, 5 C. Rob. 155; See Kent's Com., 130.)

In a word, the proof of the property of a ship is by rules of evidence, adopted generally in all courts of admiralty, adjudicating questions of international right, not materially differing in Great Britain and the United States.

At one period, it was customary for the government of the United States to issue sea letters and certificates of ownership to vessels owned by citizens of this country, whether the ship were, or were not, entitled to registry and enrolment. See the forms on this point in *Sleght vs Rhinelander*, 1 Johnson, 192 and 2 Johnson, 531.

The further issue of those particular documents, after the 30th of June, 1810, seems to be prohibited, by the act of March 26th, 1810, so far as regards vessels not entitled to registry and enrolment. 2 Stat. at Large, 568. But it is inexact to say, as the annotator on Abbott does, (Abbott on Shipping, by Story and Perkins, 63, note) that sea letters and certificates of ownership "have become almost, if not altogether, obsolete," by the operation of this act. On the contrary, "sea letters or passports" may still be lawfully issued in the cases not forbidden by the act, and are by many of our treaties the only received evidence of the ownership and consequent nationality, of a merchant ship. E. g. Colombia, art. 19; Central America, art. 21; Venezuela, art. 22; Chili, art. 19; Mexico, (1831), art. 23; Brazil, art. 21; New Grenada, art. 22.

Similar engagements occur in some of the older treaties of the United States with European states; as for instance, in that of 1795 with Spain; and the articles of this treaty have been the subject of important adjudications, which conclusively show that the neutral character of a ship may be sustained, without her having on board either register, sea letter or passport. (*The Pizarro*, 2 Wheaton, 227; *The Amiable Isabella*, 6 Wheaton, 1; *The Nereide*, 9 Cranch, 388.)

The question, of what particular documents, if any, shall be issued from the Treasury or State Department, to a foreign built ship, lawfully owned by a citizen of the United States, in the absence of any special legislation on the subject, seems to me a proper one for the consideration of the Executive and of Congress.

I am, very respectfully,

C. CUSHING.

HON. WM. L. MARCY,  
*Secretary of State.*

LIVES AND TIMES OF THE CHIEF JUSTICES OF THE  
SUPREME COURT OF THE UNITED STATES.BY HENRY FLANDERS.<sup>1</sup>

The above handsome volume has just been issued in a style very creditable to the liberality of the publishers. The care and labor bestowed by the author upon his work, merited the compliment.

Mr. Flanders has hitherto been known as the author of two very excellent works on Maritime Law. In this new field of literary labor, he has displayed great industry and care in collecting material, and much discrimination in weighing authorities. And above all, we must give him credit for a manly frankness in stating the conclusions which he has arrived at. The most valuable quality in a biographer is integrity—but it is also the rarest. A reader of biographies will feel the force of Charles Lamb's exclamation in the church-yard, "I wonder where they bury the bad people." Mr. Burke says that we should take care not to depreciate our ancestry, because by exalting them in our own imaginations, we raise the standard of the examples we aspire to. This may be very right in dealing with them as a class, or in treating of those objects of a nation's admiration, such as Alfred the Great, whose attributes are the emanations of popular characteristics. But in writing of common-place men, whose lives form a part of the history of their times, we must have them fairly set before us with all their weaknesses and incongruities, when necessary to explain any circumstances in their career. It is often the saddest and therefore the most solemn duty of an honest biographer, and it should, for that reason, be done in a reverent spirit. We want no *Chroniques Scandaleuses*: we deprecate the unearthing of faults which, for all the world's concern with them, were buried with the dead man's bones, and we desire no posthumous gibbeting of reputations, but we do ask that our historians and biographers, when dealing with the characters of men whose lives are public property, should cease to be mere apologists, and that they should believe it is not their duty to present the subject of their memoirs as they should have

<sup>1</sup> Published by Lippincott, Grambo & Co., Philadelphia.

been, but as they actually were. In respect of truthfulness, we believe Mr. Flanders has performed his duty fairly to the public.

The characters of Jay and Rutledge which are the subjects of the first volume, form happy contrasts. The comparison of the individual traits of these two men, whose careers of usefulness ran so nearly parallel, and led to positions of equal merit and approval, illustrates forcibly from how widely different starting points the paths which lead to eminence converge. In the character of Rutledge we discover a fitness for the times he lived in, which makes his fiery, impetuous character, appear almost as the necessity of a society in a state of revolution, and there is a fearful degree of dramatic truth in the awful eclipse of that superb intellect, when the restored repose of an organized government left no fair field for the display of its powers. But Jay is the very last person one would select as a revolutionary leader. He possessed those exquisitely balanced moral qualities, that calm judgment and deliberate purpose whose field of action is a state of public affairs and society, when "human statute has purged the gentle weal." Possessing few qualities which captivate popular approval, except that equality of temper and sweetness of disposition which go further to win the affections than to excite admiration, he nevertheless occupied no less important posts and had fully as large a share of the nation's confidence as his more brilliant, and perhaps more highly gifted successor, on the Supreme Bench.

We quote a passage from this work in which Mr. Flanders very happily expresses Mr. Jay's views in the early days of the Revolution, as furnishing an illustration of the moderation of which we speak :

"Mr. Jay was fully sensible of the alarming crisis that had arrived in the public affairs. He was opposed, however, to precipitate action. In fact, while viewing the acts of the ministry as aggressive, unconstitutional, and dangerous to the rights and liberties of his countrymen, his sentiments as to the measure and mode of redress were of the most moderate tone. He had not risen 'to the height of the great argument.' He was seeking reinforcement from hope, not resolution from despair. He was eminently a man



of prudence and caution. He was not sagacious of the future. His watch, unlike Talleyrand's, did not go faster than his neighbor's. He seldom placed himself in the van of events. No fiery, burning zeal, dwelt in his bosom. But when he assumed a position, the solid ground was not more immovable. He performed his duty under all circumstances with steadiness, resolution, and undiverted attention. But neither his opinions nor conduct were in the smallest degree the result of impulse or enthusiasm. His perceptions were strong rather than quick. He was more remarkable for logic than intuition. Thus constituted, we might naturally infer that he would embrace the views of the moderate party, rather than those of more eager and impetuous characters. As the contest proceeded, however, his spirit rose with the spirit of his countrymen, and he advanced steadily but cautiously on the course he now adopted."

Possessing such qualities and views, it is singularly creditable to the good sense of his countrymen that so great confidence was reposed in Mr. Jay. As a member of the Council of Safety, he became afterwards entrusted with almost dictatorial powers, which his excellent judgment enabled him to exert with equal benefit to the States and to the citizens. Mr. Jay's early views were shared by many others, who afterwards became earnest and zealous champions of the independence of their country, and it will perhaps not be considered out of place to quote from the present work a letter from Gouverneur Morris to Mr. Penn, in which Morris expresses views not very complimentary to the masses of his countrymen, but which may be excused in "a young man of twenty-two, self-confident, daring, ambitious, contemptuous."

"The port of Boston," he says, "has been shut up. These sheep," (the people,) "simple as they are, cannot be gulled as heretofore. In short, there is no ruling them; and now, to leave the metaphor, the heads of the mobility grow dangerous to the gentry, and how to keep them down is the question. While they correspond with the other colonies, call and dismiss popular assemblies, make resolves to bind the consciences of the rest of mankind, bully poor printers, and exert with full force all their other tribunital powers, it is impossible to curb them. But art sometimes goes further than



force, and therefore to trick them handsomely, a committee of patri-  
cians was to be nominated, and into their hands was to be com-  
mitted the majority of the people, and the highest trust was to be  
reposed in them by a mandate that they should take care, *quod res-  
publica non capiat injuriam*. \* \* The mob begins to  
think and reason. Poor reptiles ! it is with them a vernal morning ;  
they are struggling to cast off their winter's slough ; they bask in  
the sunshine, and ere noon they will bite, depend upon it. The  
gentry begin to fear this. Their committee will be appointed, they  
will deceive the people, and again forfeit a share of their confidence.  
And if these instances of what with one side is policy, with the  
other perfidy, shall continue to increase and become more frequent,  
farewell, aristocracy ! I see, and I see it with fear and trembling,  
that if the disputes with Britain continue, we shall be under the  
worst of all possible dominions. We shall be under the dominion  
of a riotous mob. It is the interest of all men, therefore, to seek  
for réunion with the parent state. A safe compact seems, in my  
poor opinion, to be now tendered. Internal taxation is to be left  
with ourselves. The right of regulating trade to be vested in Great  
Britain, where alone is found the power of protecting it. I trust  
that you will agree with me that this is the only possible mode of  
union."

And in connection with this amusing and characteristic letter,  
we will not hesitate to introduce Mr. Flanders' spirited sketch of  
this remarkable man :

"If the figure of Gouverneur Morris is eclipsed by the superior  
proportions of Franklin's, he was, nevertheless, no common man.  
He had extensive information, and vigorous faculties. He had quick  
and clear perceptions, and admirable talents for affairs. He was  
sagacious, reflective, acute and versatile. He had employed  
his mind chiefly upon law, politics, and the practical concerns of  
life, though he was by no means insensible to the attractions of lite-  
rature. His imagination was lively, but his genius was eminently  
practical. He was voracious of facts, and was conversant with the  
details of finance, trade, manufactures, and agriculture. The char-  
acter of his mind disposed him to subjects of immediate interest,

rather than remote inquiries. He revered order, had high respect for the advantages of fortune, and was uncompromisingly opposed to every scheme of politics that might endanger either. He had great powers of eloquence. His illustrations were apt and pointed; his elocution flowing and graceful. Unlike duller mortals, he never spun 'the thread of his verbosity finer than the staple of his argument.' He was a great talker, and fitted to enlighten, instruct and adorn society. His conversation was lively and various, but frequently offended by a tone of dogmatism which he never could correct. He did not bear his faculties meekly. He had not the grace of conciliation. With undoubting confidence in his own convictions, he had small respect for those of other people. He had a brave, outspoken nature, scorned to conceal his sentiments, and was not veered from his course,

'By every little breath that under Heaven is blown.'

He stood firmly on the earth, and his feelings never soared beyond it. He walked by sight and not by faith. The spiritual had small dominion over him.

With his free, unrestrained wit, he would have put to flight a whole troop of transcendentalists, with their water-gruel aspirations, and yearning after imaginary good. He had high animal spirits, and voluptuous tastes. 'He is fond of his ease,' said Madame de Damas, a French lady, who knew him intimately and admired him much, 'does his best to procure it, and enjoys it as much as possible. He loves good cheer, good wine, good company. His senses, as well as his mind, have a high relish of perfection, and strive to attain it. He never eats a bad dinner without a severe censure upon the cook, as he never listens to folly without a keen rebuke.'

But to give anything like a just notion of the contents of Mr. Flanders' volume, would surpass the limits we are able to assign to this notice. The lives of both Jay and Rutledge contain a summary of the early training, and of the personal characteristics of the individuals, and a full account of their public services. That of Jay was extended over a more varied field, and therefore, perhaps, has a greater degree of interest than that of Rutledge, whose

services and reputation was more provincial. A great deal of instruction, as well as of entertainment, is afforded by the author in the sketches, interspersed throughout the volume, of individuals brought into connection with the principal subjects, and of which we have already given one extract.

In the life of Jay the two most important points treated of are his mission to Spain, Chapter XI, and the treaty which he negotiated with England, and which is commonly known as Jay's Treaty, Chapter XV.

The career of Mr. Jay while Minister to Spain, is carefully and minutely traced out, and forms a most agreeable narrative, flattering to our national pride, as all our early diplomacy was, and disgraceful to the Spanish government, as most Spanish diplomacy has been. The subject of Jay's treaty is discussed in a clear and discriminating spirit. It is this point in his career which gave most offence, but we think that Mr. Flanders has brought a mass of contemporaneous evidence in support of its propriety, or rather necessity, which will be found convincing. It was a necessity, because it was the best that could have been obtained, and we believe that impartial history will give just praise to those who, at the risk of their popularity, had the courage to support it.

The life of Rutledge forms almost a complete history of the Southern war of Independence, and to some readers may prove, from the variety of personal narratives it contains, the more agreeable. There are some points of history treated in this volume in too candid a spirit, perhaps, always to be flattering to national vanity, but the time we believe has passed when an American historian will feel himself called upon to discuss any public matter otherwise than in the spirit of exact truth. It is indeed pitiable, if we cannot stand the test of impartial history.

We trust soon to have the remaining volumes of the work. The lives of Marshall and of Ellsworth will afford an excellent field for Mr. Flanders' research, and they will enable him to enter more fully into the judicial history of the Supreme Bench. The life of Chief Justice Cushing will afford but little scope for an interesting biography. He took no part in the politics of the country. He

was only a lawyer. The judicial careers of both Jay and Rutledge were also unimportant, and though Mr. Flanders has given the details of their most interesting decisions, they afford but meagre elements of interest in this volume. The succeeding ones, on that score, will be more interesting to the lawyer, if not to the layman.

It is after full consideration that we recommend this work to the perusal of our readers.

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RECENT AMERICAN DECISIONS.

*In the Supreme Court of Pennsylvania.*

RYAN vs. THE CUMBERLAND VALLEY RAILROAD COMPANY.

1. Where several persons are employed to attend to the same general service, and one of them is injured from the carelessness of another, the employer is not responsible.
2. Where A, a laborer on a railroad, engaged in making repairs on the track, which are carried on partly by the use of a gravel train moved by locomotive power, meets with an accident by the dumping of one of the cars, he has no remedy against the railroad.
3. The relation of master and servant is a relation of contract.

The opinion of the Court was delivered by

LOWRIE, J.—The plaintiff, with many others, was employed by the defendants to make repairs on their road, and the work was carried on partly by means of a train of gravel cars, made to dump to either side, and moved by locomotive power. He was a common laborer, employed in digging and in filling the cars and such like work; and, as the hands boarded in Chambersburg, about four miles distant, it was usual, and therefore it is proper to say that it was the understanding, that they should ride to and from their work in the gravel cars. While the plaintiff and others were thus going to their work, at railroad speed, the accident complained of happened by the dumping of one of the cars, which seems not to have been hooked, and throwing the plaintiff out upon the road.

The nature of the case requires the admission that it was the understanding of the parties that the hands were to ride on the

gravel train to and from their work, and at their work, and the plaintiff is entitled to use this fact as a part of his case. He cannot, however, use it as presenting the whole of the relation between him and the defendants. He was not a mere passenger on the defendants' cars, because his travel upon them was really but an incident of a different relation, that of a servant, and this is the character in which we must regard him here. He was no more a passenger than is the coachman or wagoner or carter, who is in the employment of another. He was simply a servant, with the privilege of riding, as part of his business, in the gravel train, which was one of the instruments of his work. He could not and does not, sue on a contract as a passenger, for that was not his relation; but he does sue on his true relation as a servant injured by the carelessness of fellow servants.

The plaintiff seeks to strengthen his position by the allegation and by evidence that it was the duty of the engineer to see that all the cars were safely hooked before starting the train, and that his neglect in this respect is chargeable to the company. As matter of fact this does not seem probable, yet we must examine its influence as if it might be proved.

This alleged duty did not grow out of any contract between the plaintiff and the defendants, else the contract would have been charged as an essential and relevant bond of their relation, which has not been done. If it was a duty which the engineer owed to the plaintiff in any way, then the action ought to be against him for the breach of it. If he owed it to the defendants, then they alone can complain of its non-performance.

The duty must therefore be alleged as that of the defendants to the plaintiff. In what form shall we put it, or how shall we define it? Is it that when persons are employed to work for others, the employers are bound to see that the instruments of their work are and shall continue in a condition to be used with safety? Then the coachman, the wagoner and the carter, who ought to know more about the vehicles which they use than their employers do, have a practical warranty that they are in good order; though practically we know that many of them are nearly worn out; the wood chopper and the grubber are insured that their axe or mattock shall not injure

them by flying off the handle ; the engineer, the miller, the cotton spinner and the wool carder, have a guarantee for the accidents that may befall them in the use of the machinery which they profess to understand, and which they ought so to understand as to be able to inform their employers when it is out of order.

If this be so, then the care and skill required of workmen is reduced very much below what is ordinarily expected of them. If there be any distinction between any of the cases put and the one in hand, it is too narrow to be made the foundation of a new rule, or to cancel the force of the analogy which they afford. Certainly such a duty has never been considered as belonging to these relations, and therefore it cannot be law.

The only way left for defining the supposed duty, is to allege that employers are liable when any of those employed by them are injured by the carelessness of their fellow-laborers. Though this proposition has never been decided upon by this Court, it has often been considered elsewhere, and decided in the negative, and we know of but one case that seems to affirm it, 20 Ohio Rep. 415.

It has been decided in the negative in cases relating to those employed in running railroad cars, 1 McMullen, 385 ; 3 Cush. 270 ; 4 Met. 49 ; 5 Exch. Rep. 343 ; 6 Barb. R. (Sup. C.) 231 ; 15 id. 574 ; in navigating vessels, 2 Richardson, 455 ; in driving a wagon, 3 Mees. & W. 1 ; in building, 5 Exch. R. 354, 6 Hill, 592 ; and in factories, 6 Cush. 75. And such is the rule even when the careless one is the superior of the other, or has a special duty to perform upon which the safety of the others depend. Where we find a road so well beaten, it is easy to follow it, and its beaten character is an indication that we may follow it with safety. We shall trust to this indication, sustained as it is by reasons which have been so fully expressed by others that we can do little else than repeat them.

The rule announced by these cases is, that where several persons are employed to attend to the same general service, and one of them is injured from the carelessness of another, the employer is not responsible.

On what principle can a contrary rule be founded ? The maxim, *sic utere tuo ut alienam non laedas*, does not apply ; for that is the most general of all rules, intended to define the duties of those who

have no other relation than contiguity and common humanity. It is intended as the general rule defining the general relation of man in society, and not any of the special relations, which must have their own rules depending upon their special character. Our question is therefore reduced to this, What is there in the special relation of master and servant from which a contrary rule can be deduced ?

With us this relation is always instituted by a contract, and to that we must look for the principal terms by which it is defined. The contract defines the duty of each party ; and as we do not find that the duty which is now insisted on was made a part of the contract, we infer that it has no existence.

But it must be conceded that many of the relations of life are instituted in the most general terms, and that the special duties of each party are so well understood in society, that they are left entirely undefined in the contract, and each is presumed to have undertaken them without their being formally specified. Certainly no one will pretend that the duty here insisted upon, has in this way become part of this contract ; for no one so understands it, and no one would so contract, if requested.

There is, therefore, no way left but to allege that the law has made it a duty of a master to see that his servants do not injure each other by their carelessness. There is no statute of this purport ; and therefore the allegation must be that it is a part of the common law. But the common law consists of the general customs of the people, and of the maxims and principles on which they act ; and it is conclusive against the rule contended for, that it has never been found among these, and is not deducible from them.

But the duty insisted upon is substantially one of protection, which cannot exist without implying the correlative one of dependence or subjection. The relations of husband and wife, parent and child, are in law relations of protection and dependence ; and there are those which are so in fact ; as where a weak-minded person submits himself to the direction of another : and here the law interferes to protect against an undue exercise of influence and power. And there are others, as the Sunday laws and the laws



regulating the hours of labor in particular occupations, whereby the law protects men against the danger arising from undue competition ; but the strictness used in defining this relation as belonging to special cases, implies that it has no wider existence.

There is no relation of protection and dependence between master and servant, or of confidence in the institution of the relation : we speak not of master and apprentice. The servant is no Roman client or feudal vassal, with a lord to protect him. Both are equal before the law, and considered equally competent to take care of themselves, and very often the servant is the more intelligent of the two.

The argument that the law implies a warranty that one servant shall not be injured by the carelessness of another, is only another way of stating the proposition that the law imposes the duty of protection ; and it must be set aside by the same answer.

And what would be the value of such a rule ? If it exists at all, it must grow out of the relation, and affect all persons standing in it ; and this would change all our ideas concerning the relation of master and servant. Every man must have his own business, whether as master or as servant, and there is no business without its risks. Where many servants are employed in the same business, the liability to injury from the carelessness of their fellows is but an ordinary risk, against which the law furnishes no protection but by an action against the actual wrongdoer. It would violate a law of nature if it should provide an immunity to any one against the ordinary dangers of his business, and it would be treating him as incapable of taking care of himself.

If we declare that workmen are warranted against such carelessness, then the law places all careless men, which means all badly educated or badly trained men, and it places even those who have not acquired a reputation for care, under the ban of at least a partial exclusion from all work. And this is the ordinary result of all undue attempts to protect by law one class of citizens against another. It is done at a practical sacrifice of liberty on the part of those intended to be protected, and to the embarrassment of the common business of life, by imposing upon the people a rule of a new and unusual character, which may require half a century



to become fitted like a custom, and adapted to the customs already existing, which it does not have the effect of annulling.

If this were the rule, it would embarrass the conduct of all business, where any risk is to be run. How could a sailor be ordered aloft in a storm, without the employers being liable to the charge that the captain had shown want of proper skill and care, in giving such an order, in the circumstances? How could the wearied laborer be allowed to ride home with the driver, without danger that the employer should be called to account for an accidental tilting of the cart?

And such a rule could have very little application to great corporations, for they would immediately act on the maxim, *conventio vincit legem*, and provide against it in their contracts. But it would live to embarrass the more private and customary relations, and be the source of abundant litigation. The Court below decided rightly, that the rule contended for has no existence.

Judgment affirmed. LEWIS and KNOX, JJ. dissenting.

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*In the Supreme Court of the United States.*

Before Judge McLEAN, at Chambers, at Washington City.

THE UNITED STATES, vs. THE RAILROAD BRIDGE COMPANY ET AL.

1. An action by the Federal Government is subject to the forms of pleading and the rules of practice applicable to suits between individuals.
2. The commercial power of the Federal Government under the constitution, discussed.
3. Land purchased for military purposes cannot be sold without special authority from Congress; otherwise as to land reserved out of the public domain and then abandoned.
4. Construction of the Act of Congress of Aug. 4, 1852, granting the right of way through public lands.
5. The power of a State to grant the right of eminent domain to a private corporation.
6. The right of eminent domain is in the State, and the exercise of this right by a State is nowhere inhibited in the Federal Constitution, or in the powers exercised over the public lands.
7. A State has power to authorize a railroad through the public lands of the United States.
8. Irreparable injury to the public lands will alone justify an injunction.

This is an application by the United States for an injunction, against the Railroad and Bridge Company, to prevent them from constructing their railroad across Rock Island and bridges connected therewith, over both channels of the Mississippi river.

The case was ably argued by

*The Attorney General of the United States*, and

*Mr. Hoyne*, district attorney for the northern district of Illinois, for the complainants; and by

*Mr. Reverdy Johnson*, and *Mr. Sargent*, and *Mr. Judd*, on the part of the defendants.

McLEAN, J.—The bill states that as early as 1812, the western extremity of Rock Island was occupied as a military post called Fort Armstrong; that various buildings and fortifications were erected thereon, by the United States, which were occupied for military purposes from 1816 to 1836; at which date it was evacuated by the troops of the United States, and ceased to be a military garrison.

In April, 1825, the island was reserved for military purposes by the secretary of war, of which the commissioner of the general land office was informed and by him due notice was given to the register and receiver of the land office in which the reservation was situated.

By the order of the secretary of war in 1835, the whole of Rock Island was reserved for military purposes; and the register and receiver of the land office at Galena, a new land district, which included the island, were duly notified by the commissioner of the general land office.

Since the troops were withdrawn from the island, it has been occupied, as the bill states, by the Indian department, by the ordnance department, as a depot for arms, &c.; and by agents of the quartermaster's department for the protection of the property of the United States, up to the time of filing the bill. And the complainants allege that the defendants have located their railroad over the island, and by their agents have made large and deep excavations of earth and embankments on the line of the road over the island, removing rocks and cutting timber, greatly to their injury and the injury of the soil, for which injuries no adequate remedy can be had by an action at law.

And the complainants also allege that preparation has been made by the company for the construction of a bridge over the western channel of the river, which will materially obstruct the navigation of steamboats, many of which ply upon the river, several hundred miles above Rock Island; that steamboats, in carrying on a commerce on the river, frequently take boats or barges in tow on each side of them, which would require a much wider draw to pass down the river than the one proposed to be made in the bridge, and that it would at all times be difficult and dangerous, from the rapidity of the current for a steamboat to pass through the draw. On these grounds substantially, and on the ground that the power to regulate commerce among the several States is vested in Congress, &c., an injunction is asked.

The defendants rely on two acts of the legislature of the State of Illinois, one dated in 1847, and the other in 1851, incorporating and authorizing them to locate a railroad, with one or two tracks, by the way of La Salle, from Chicago to the town of Rock Island, on the Mississippi river; and they allege that on the 17th day of January, 1853, the legislature of Illinois created the defendants a body corporate with power to build a railroad bridge across the Mississippi at or near Rock Island, or so much thereof as is within the State of Illinois; and to connect by railroad or otherwise, with any railroads in the States of Illinois or Iowa, in such manner as shall not materially interfere with or obstruct the navigation of the river, &c.

And the defendants set up the following report of the secretary of war, dated the 30th of December, 1847: Sir, In compliance with a resolution of the Senate, of the 22d instant, requiring the secretary of war "to inform the Senate if Fort Armstrong, on Rock Island, in the State of Illinois, is now occupied as a fort; and if not, how long the same has been abandoned, in whose charge the same is, and on what terms; and also that he communicate his opinion if the interest of the government requires that said site should be reserved from sale for military purposes," I have the honor to transmit, herewith, reports from the adjutant general, the acting chief of ordnance, and the quartermaster general, containing the information desired; and to state that, in my opinion, the interest of the

government does not require that said site be longer reserved from sale for military purposes."

(Signed)

WM. L. MARCY.

The adjutant general reported that Fort Armstrong, on Rock Island, was evacuated May 4th, 1836, in pursuance of general orders No. 9, dated January 25th, of the same year. He says it was subsequently used by the ordnance department as a depot on a small scale for arms and munitions; but it is understood the stores were all removed some years since. Rock Island, he states, is not believed to be of any value for military purposes, and is considered as finally abandoned.

The quartermaster general reported "that Fort Armstrong is now in charge of his department; and that Thomas Drake is employed at a compensation of fifteen dollars per month to take care of it." It is of no further use to the public as a military site, and he recommended that it be transferred to land department. The chief of ordnance reported that as far as regards the ordnance department, he considered the reserve no longer necessary for military purposes.

On the 11th of February, 1848, the secretary of war enclosed the above reports to the secretary of the treasury, and says, "that the site of Fort Armstrong is no longer required for military purposes, and it is therefore hereby relinquished and placed at the disposal of the department which has charge of the public lands."

(Signed)

WM. L. MARCY.

A return of the survey of the land on Rock Island, as public lands as surveyed by the surveyor general, is in evidence.

Under the act of June the 14th, 1809, which authorized the President of the United States to erect such fortifications as may be necessary in his opinion for the protection of the north-western frontier, Fort Armstrong was built. But the reserve was not made in form until 1825, as above stated.

By the act 8d March, 1819, the secretary of war was authorized, under the direction of the President, to cause to be sold such military sites belonging to the United States, as may have been found

or become useless for military purposes. And the secretary of war is hereby authorized, on the payment of the consideration agreed for, into the treasury of the United States, to make, execute and deliver all needful instruments for transferring the same in fee, and the jurisdiction over the reserve ceded by a State, shall cease.

In 1850 the secretary of war instructed the adjutant general to write to Col. Mason, directing the sale of the reservation on Rock Island, on terms most favorable to the United States. In three or four months afterwards a telegraphic dispatch, postponed the sale "until further orders."

By the act of the 4th of August, 1850, the right of way was given to all rail and plank roads or macadamised turnpike companies, that were or might be chartered over and through any of the public lands of the United States, &c., with the following proviso: "That none of the foregoing provisions of this act shall apply to, or authorize any rights in any lands of the United States, other than such as are held for private entry or sale, and such as are unsurveyed and not held for public use, by erection or improvement thereon."

This case involves several very important questions, some of which have not been heretofore raised for judicial consideration.

The suit is brought by the general government, not in its sovereign capacity, but for the protection of certain public trusts committed to it, which require, as is supposed, the exercise of the judicial power. This is more in accordance with the principles of our government, than a resort to military force. The President, under existing laws, may remove trespassers from the public lands, by a military order, or by a civil action, or an indictment.

Where a suit is brought by a State, or by the general government, it is subject to the forms of pleading and the rules of procedure, applicable to suits between individuals; and wherever an injury is inflicted on the public rights protected by law, a remedy, civil or criminal, is given.

Congress has the exclusive power, under the constitution, to regulate commerce between two or more States, and it is contended that in virtue of this power, the complainants have a right to maintain this suit, on the ground that the bridge proposed to be con-

structed will be an obstruction to commerce, and this presents a new question.

The commercial power of the constitution is that which the federal government exercises in its sovereign and legislative capacity. It has regulated commerce on the Mississippi river and the other navigable rivers of the United States, so far as navigation by steamboats is concerned; and ports of delivery have been established. This regulation has extended, on the Mississippi, a great distance above Rock Island.

But this commercial power can only be exercised and carried out by legislation; and when this shall be done, any violation of the laws will subject the offenders to the penalties provided. The instrumentality of the judiciary can be invoked only by the government, to give effect to its laws, civil or criminal, but the judicial power cannot precede that of legislation. The rule of action on all questions of policy, within the federal powers, must be prescribed by Congress.

There is no federal common law which pervades the Union, and constitutes a rule of judicial action. But in all the States the common law is in force, in a greater or less degree. Its existence and extent are shown by the statutes of the States respectively, and the usages of the courts. But there is no common law in regard to regulations of navigation. These must be adapted to the peculiar circumstances of a country, and the facilities which exist for traffic. In this respect, the legislation of Congress is the only remedy known to the constitution.

If it be admitted that the bridge would be an obstruction to the commerce on the Mississippi river, is there any power in the judiciary to remedy the evil? The commercial power is in Congress, but until it shall prescribe the rule, the power is dormant. Congress has power to punish the counterfeiting of the current coin of the Union, the violations of the mail, and many other acts, but until the law shall fix the punishment, the courts of the United States cannot punish.

Neither can a proceeding by indictment or information be instituted in the judicial courts of the Union, without statutory authority.

The law of redress must be enacted before redress can be given. In this respect, as a suitor, the government occupies the same position as an individual or a corporation.

If there be an obstruction in or over a navigable water which injures private right, redress may be found by an action. On this ground the Supreme Court sustained the complaint of the State of Pennsylvania against the obstruction of the Wheeling Bridge, because it was an injury to the improvements of that State which it had constructed, and from which a revenue was derived. The State sued as an individual might have sued, on the ground of an injury which, at common law, was irreparable. For such an injury the general government may obtain an injunction.

But no such special injury to the property of the government is alleged in this case, except as to the reserved land on Rock Island, which allegations will be hereafter examined. The power to regulate commerce is not property, nor is it in this view a subject of judicial action where it has not been exerted.

Under the commercial power, Congress may declare what shall constitute an obstruction or nuisance, by a general regulation, and provide for its abatement by indictment or information, through the Attorney General. But neither under this power, nor under the power to establish post roads, can Congress construct a bridge over a navigable water. This belongs to the local or State authority, within which the work is to be done. But this authority must be so exercised as not materially to conflict with the paramount power to regulate commerce.

If Congress can construct a bridge over a navigable water, under the power to regulate commerce or to establish post roads, on the same principle it may make turnpike or railroads throughout the entire country. The latter power has generally been considered as exhausted in the designation of roads on which the mails are to be transported; and the former by the regulation of commerce upon the high seas, and upon our rivers and lakes. If these limitations are to be departed from, there can be no others, except the discretion of Congress. It is admitted, that in the regulation of commerce, as a question of policy, the only limitation imposed by the



constitution is, that no preference can be given to a port in one State over those of another.

Was Rock Island a military reserve at the time the alleged trespass was committed? That it was reserved for military purposes in 1825, is clear. The Secretary of War, acting under the President and by his authority, reserved it, and it was so entered on the books of the land offices at Edwardsville and Galena. And it was occupied as such until the year 1836, when it was abandoned as a military post; the troops were withdrawn, and sometime afterward the buildings were sold.

The abandonment of Rock Island as a military post, and for all public purposes, was as complete, as its reservation had been, by all the public authorities by whom it was selected or used.

The suspension of the sale under the act of 1819, was ordered by Mr. Poinsett, Secretary of War, not because it was wanted for public purposes, but on the ground that the act did not authorize its sale. On the 8th of November, 1838, he wrote to the general land office, that "the reservation would not be sold under the above act, and that it was left to the general land office to take such measures for the sale of the reservation as it may deem proper, under existing laws." In this view Mr. Poinsett was correct. The act referred to, provided "That the Secretary be and he is hereby authorized, under the direction of the President of the United States, to cause to be sold such military sites belonging to the United States as may have been found or become useless for military purposes." "And the Secretary of War," the act provides, "is hereby authorized, on the payment of the compensation agreed for into the Treasury of the United States," to execute a deed, &c.

This law, from its language, was not intended to be a general regulation, but authorized the sale of military reserves which, at that time, had become useless. It changed the settled mode of selling public lands, as it authorized the Secretary to sell for a price agreed on, which precludes or at least renders unnecessary a sale by public auction, as the general law for the sale of the public lands required. This consideration, as well as the purport of the section, showed that it was not a general regulation, but was intended to operate



upon military reservations which then existed and which were unnecessary.

The Attorney General contends that "the frequent interposition of Congress, especially authorizing the sale of military reservations, negatives the idea that they could be sold without statute authority."

Where land has been purchased by the United States for military or other purposes, it is admitted the land cannot be sold without the special authority of Congress. In such cases the purchase is made for a specific object, and being purchased with the consent of the State, under the federal constitution, there is a cession of jurisdiction as well as of property. Now, to transfer property so acquired, and relinquish the jurisdiction, the authority of Congress is indispensable. And this shows the reason why the act of 28th April, 1825, was passed. It provides in the first section, "that in all cases where lands have been, or shall hereafter be conveyed to or for the United States, for forts, arsenals, dock-yards, light-houses, or any like purpose, &c., which shall not be used as necessary for the purpose for which they were purchased or other authorized purposes, it shall be lawful for the President of the United States to cause the same to be sold for the best price to be obtained, and to convey the same by grant or otherwise."

Now, from this act it does not follow that where the government reserves its own land from sale, for any public purpose, that a special act of Congress, after its abandonment, is necessary for the sale of it. The President, under a general power given him by the act of 1809, selected a part of the land on Rock Island for a military site, on which Fort Armstrong was built. And when he finds the place no longer useful as a military post, or for any other public purpose, he has a right to abandon it, and notify the land offices where the reservation was entered. The entry on the books of the land offices within which the reserved site is situated, and the occupancy of the place by the government, are the only evidence of the reservation. And when this evidence is withdrawn, and the site is abandoned, the reserve falls back into the mass of the public lands subject to be sold under the general law. But before such land can be sold at private sale under the general system, it must, by procla-

mation, be offered at public auction. The proclamation should give notice of the sale of the reserved tract as other lands. In this mode, I think, the sale would be a valid one.

The right claimed in the case of *Wilcox vs. Jackson*, 13 Peters, 509, was a pre-emption under the act of 1834, which declared that no entry or sale of any land shall be made under the provisions of the act, which shall have been reserved for the use of the United States, or which is reserved for sale by act of Congress or order of the President, or which may be appropriated for any purpose whatever." Before the entry was made as a pre-emptive right by Beanbin, a light-house upon the reserve was built by the government, and the possession of it for public purposes has never been abandoned.

Under the circumstances stated, Rock Island cannot be considered as a military reserve. The possession of it was abandoned and the right of government released, through the same authority by which it was appropriated. And no act has been done by the government, by which a new appropriation of the ground for military or other public purpose is shown or can be presumed. The building had been sold by the government. The sale of the reserve was suspended, it is presumed, because there was no power to sell by the War Department, under the act of 1819. That the suspension of the sale was in no respect influenced by a desire to retain Rock Island for any public purpose, appears by the subsequent action of the War Department.

The next inquiry is, whether the land in question is within the provision of the act of Congress of August 4th, 1852, which grants the right of way through the public lands to all roads, &c.

The first section of that act grants "to all railroads and McAdamized turnpike companies, that may be chartered within ten years, over and through any of the public lands of the United States, may be authorized by an act of the legislature of the respective States in which public lands may be situated," &c. To the third section of that act there are several provisions, the last of which is, "That none of the foregoing provisions of this act shall apply to or authorize any rights in any lands of the United States other than such as

are held for private entry and sale, and such as are unsurveyed and not held for public use by erections or improvements thereon."

This act required the proper officers of such road to transmit to the commissioner of the general land office, "a correct plat of the survey of the road, together with the survey of sites for depots, which were granted on the line of such selection, which shall become operative." This survey of the road and of sites for depots on it, was transmitted to the commissioner of the general land office, as the act required.

In a report of the commissioner of the general land office to the Secretary of the Interior, dated 19th of January, 1854, the commissioner says, by way of note: "As regards the right of way for the road, now under consideration it is already granted by the general act entitled, "an act to grant the right of way to all railroads," &c. In the same report the commissioner states, "that several bills have been reported to Congress of late years, materially changing the mode of disposing of such reservations, which are now on special file."

The opinion of the commissioner, as to the right of way or the necessity of legislation, before reserves can be sold, whether right or wrong, can have no influence in the decision of this case. A part of the land on Rock Island has been granted, and it is proposed to make, in addition, one or more private grants. This shows, at least that the reserve does not, in the opinion of Congress, remain to the extent of the Island.

Although this land cannot be now considered a military reserve, yet it is not "held," in the language of the law, "for private entry and sale." Under the general law, no public land can be so considered, which has not been offered at public auction, under the proclamation of the President. In giving a construction to this act the court is not at liberty to change the meaning by changing the copulative conjunction into a disjunctive. If effect could be given to the argument, in this respect, it would pervert the meaning of the act. But this reading, if it were admissible, would not change the effect of the act. Land is not held for private entry, which has not been offered at public sale; nor is land held for sale in the meaning

of the law, which has not been so offered. It is true the land was directed to be sold under the act of 1819; but as that act did not authorize such a sale, the land cannot be considered to have been held for private sale.

The other member of the sentence describing lands within the act is, "And such [lands] as are unsurveyed and not held for public use by erection and improvements thereon."

Now this provision applies to the period of time, when the right is claimed by the railroad. The ground in question was appropriated for military purposes, but when the entry on the land complained of was made, it was not a military reservation; and any improvements thereon had been, not only abandoned and sold, but the former reservation was relinquished and annulled. To hold, then, under the circumstances, that the land was still a military reservation or a reservation for any public use, would disregard the facts in the case. Whether the government might not have again reserved the land for some public purpose is a question not involved in the decision. It would be in it, if there were any evidence that such reservation had been made. To presume such a reservation would be against the evidence.

The improvements under the above statute having been abandoned and sold, may be considered, as not having been made, and so as to the reservation. But still the provision is not technically within the statute. It refers to lands "unsurveyed," and the lands on Rock Island have been surveyed. This is a technical objection, and to such objections some minds on the bench and at the bar are strongly inclined. My taste does not lie in this line, as it often defeats the great ends of justice, and preserves nothing of any value.

The charter granted by the state of Illinois, to the defendants, authorizes them to locate and construct their road, to purchase the right of way, to condemn the land where necessary, and have the damages assessed as provided for in the charter. And in regard to the construction of a railroad bridge across the Mississippi river, the company is vested with power to build, maintain, and use a railroad bridge, over the river, or that portion of it which is within

the jurisdiction of the state of Illinois, at or near Rock Island, in such manner as shall not materially obstruct or interfere with the free navigation of the river; and to connect by said road or otherwise, such bridge with any railroad, either in the state of Illinois or Iowa, terminating at or near said point; to unite and consolidate its franchises and property with any or all bridges of railroad companies in either of said states."

That the State of Illinois had power to grant the charters for the road and the bridge, has not been questioned. A doubt might once have been entertained, whether a State could, under the power of eminent domain, confer the power of appropriation to private companies; but this power has been so long exercised and acquiesced in, that it is now, probably, too late to question it.

Whether a State has power by an act of incorporation or otherwise, to authorize a rail or turnpike road through the lands of the United States, has not, it is believed, been raised or judicially decided. The first impression would be, probably, that a State can exercise no such power. But first impressions are rarely to be followed on constitutional questions. They should be deliberately and deeply considered, in relation to their bearing on the federal and State powers. That the federal government is one of enumerated powers, is not controverted; nor that the States reserved to themselves all powers not conferred on the general government absolutely or by necessary implication.

In the admission of the new States into the Union, compacts were entered into with the federal government, that they would not tax the lands of the United States. This implies that the States had power to tax such lands, if unrestrained by compact.

The Constitution provides "that Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." Under this provision, Congress organized territorial governments. Having power to sell the public lands, beyond the limits of any State, a territorial government was the only mode by which the purchasers and occupants of those lands could be protected in their

rights of persons and property. Hence the implied power to establish such a government.

The Constitution was adopted a short time after the ordinance of 1787 was passed ; and as that ordinance provided for the government of all the territory owned by the United States, no express provision for a territorial government was deemed necessary. In that ordinance it was declared that the States to be formed out of that territory " should never interfere with the primary disposal of the soil by the United States, in Congress, nor with any regulations Congress may find necessary for securing the title in such soil to bona fide purchasers."

Within the limits of a State, Congress can, in regard to the disposition of the public lands and their protection, make all needful rules and regulations. But beyond this it can exercise no other acts of sovereignty which it may not exercise in common over the lands of individuals. A mode is provided for the cession of jurisdiction when the federal government purchase a site for a military post, a Custom House and other public buildings ; and if this mode be not pursued, the jurisdiction of the State over the ground purchased remains the same as before the purchase. This, I admit, is not a decided point, but I think the conclusion is maintainable, by the deductions of constitutional law.

Under Acts of Congress, trespassers on the public lands are liable to a civil or criminal prosecution. And yet the statutes of Congress are numerous, giving to settlers upon these lands, without authority, which makes them trespassers, pre-emptial rights. And this latter policy has become so popular as to induce settlers to take possession of the best portion of the public lands, before they are surveyed or offered for sale. This policy of punishing the acts of some, which are rewarded in others, seems to be inconsistent. The only excuse for the provision is, that he who takes the timber from the ground, renders it less valuable and enriches himself ; while the other settles on the land with the view of purchasing it. But he is not obliged to make the purchase, and while in possession, he may take from it the most valuable timber.

In the case of *Johnson et al. vs. McIntosh*, 8 Wheaton, 543,

it was held, "a State has a perfect right to legislate as she may please, in regard to the remedies to be prosecuted in her courts, and to regulate the disposition of the property of her citizens, by descent, devise or alienation. But Congress are invested by the Constitution with the power of disposing of the public land and making needful rules and regulations concerning it."

The proprietary right to lands in a State held by the federal government is, in many respects, similar to that of an individual. A compact may exempt the lands of either from taxation. An action may be brought by either, for an injury done the soil or timber. A conveyance of the title is made by the federal government under its own laws; and by the individual under the laws of the State. The principal distinction between the two proprietorships is, that the government makes the conveyance under its own laws, and sues in its own courts, whilst an individual proprietor, conveys under the laws of the State, and prosecutes under those laws for an injury done. But the important inquiry is, whether the public lands are subject to the sovereignty of the State in which they are situated.

It is a fair implication, that if the state were not restrained by compact, it could tax such lands. In many instances, the states have taxed the lands on which our custom houses and other public buildings have been constructed, and such taxes have been paid by the federal government. This applies only to the lands owned by the government, as a proprietor, the jurisdiction never having been ceded by the state.

The proprietorship of land in a state by the general government, cannot, it would seem, enlarge its sovereignty or restrict the sovereignty of the state. This sovereignty extends to the state limits over the territory of the state, subject only to the proprietary right of the lands owned by the federal government, and the right to dispose of such lands and protect them under such regulation as it may deem proper.

The state organizes its territory into counties and townships, and regulates its process throughout its limits. And in the discharge of its ordinary functions of sovereignty, a state has a right to provide for an intercourse between its citizens, commercial and other-



wise, in every part of the state, by the establishment of easements, whether they may be common roads, turnpike, plank or railroads. The kind of easement must depend upon the discretion of the legislature. And this power extends as well over the lands owned by the United States, as to those owned by individuals.

This power, it is believed, has been exercised by all the states in which the public lands have been situated. It is a power which belongs to the state, and the exercise of which is essential to the prosperity and advancement of the country. State and county roads have been established and constructed, over the public lands in a state under the laws of the state, without any doubt of its power, and with the acquiescence of the federal government. In this respect the lands of the public have been treated and appropriated by the state, as the lands of individuals. These easements have so manifestly conduced to the public interest that no objection from any quarter, has hitherto been made. And it is believed that this power belongs to the states.

It is difficult to perceive on what principle, the mere ownership of land by the general government within a state, should prohibit the exercise of the sovereign power of the state in so important a matter, as the easements named. In no point of view are these improvements prejudicial to the general interest; on the contrary, they greatly promote it. They encourage population, and increase the value of land. In no respect is the exercise of this power by the state inconsistent with a fair construction of the constitutional power of congress, over the public lands. It does not interfere with the disposition of the lands, and instead of lessening, enhances their value.

Where lands are reserved or held by the general government for specified and national purposes, it may be admitted that a state cannot construct an easement which shall, in any degree affect such purposes injuriously. No one can question the right of the federal government to select the sites for its forts, arsenals and other public buildings. The right claimed for the state has no reference to lands specially appropriated, but to those held as general proprietor by the government, whether surveyed or not.

The right of eminent domain appertains to a state sovereignty, and it is exercised free from the restraints of the federal constitution. The property of individuals is subject to this right, and no reason is perceived why the aggregate property in a state of the individuals of the union, should not also be subject to it. The principle is the same, and the beneficial result to the proprietors is the same in proportion to their interests. These easements have their source in state power, and do not belong to federal action. They are necessary for the public at large, and essential to the interests of the people of the state.

The power of a state to construct a road, necessarily implies the right, not only to appropriate the line of the road, but the materials necessary for its construction and use.

Whether we look to principle, or the structure of the federal and state governments, or the uniform practice of the new states, there would seem to be no doubt that a state has the power to construct a public road, through the public lands.

A grant to this effect is sometimes made by congress, as in the act of 1852; but this does not show the necessity of such a grant. Generally, congress appropriates to the road a large amount of lands. The positions are believed to be irrefragable—first, that the right of eminent domain is in the state; and secondly, that the exercise of this right by a state is no where inhibited, expressly or impliedly, in the federal constitution, or in the powers over the public lands by that instrument, in Congress.

If this view be correct the question is narrowed to the simple inquiry, whether the construction of the road through Rock Island, connected at both ends by bridges over both channels of the river, which include the island, will do an irreparable injury to the public land on the island. Several witnesses have been examined on this point and, as usual, there are among them differences of opinion. But the weight of the evidence does not show an irreparable injury. On the contrary, it appears that the works complained of will add greatly to the value of the island. From the nature of the improvement, this is so palpable as to require no illustration. By the flow of the river, on either side of the island, its inhabitants are cut off from all intercourse with the shores, except by a ferry. But the

bridges proposed and the railway, will connect the island with both shores, and bring over it a line of travel for passengers, and for the transportation of merchandise, which must add several hundred per cent to the value of the island and its products.

The testimony in regard to the obstructions to commerce by the proposed bridge, is contradictory. Many witnesses have been examined on both sides, and while those called by the plaintiffs say the bridge will, in a great degree, destroy the commerce of the river, those called by the defendants think it will be no material obstruction. This discrepancy manifestly arises from a mistake in the locality of the bridge. The defendant's witnesses live in the neighborhood of the structure, and speak of it as located, whilst the witnesses of the plaintiffs fix the bridge much higher up the river, and where from the rapid current occasioned by the falls and the ledges of rock which confine the water to a width of sixty feet, at the foot of which rapids there is a short turn to the left in the channel, very near the supposed bridge, which would render the passage through the draw if not impracticable, extremely dangerous. But the experienced engineer, Mr. Brayton, who superintends the building of the bridge, has taken the soundings of the river and surveyed and measured the distance on it from the site of the bridge to the falls and above them. This work is laid down on a map which he refers to.

He says "from the bridge up and on the sides of the river there are two chains of rock which at the bridge are widest apart, and gradually converging as you ascend, until at the distance of about two-thirds of a mile above the bridge, the channel becomes quite narrow, not exceeding in width sixty feet; that this narrow opening is in nearly a right line with the channel as it runs through said point to the proposed draw in the bridge." And it appears from the soundings that the bridge is thrown over the deepest water in that part of the river. The engineer says "the plan upon which the bridge is being constructed is a wooden superstructure, built upon Hawes' patent, supported by two stone abutments and six piers, laid in water cement. The span between the piers is two hundred and fifty feet in the clear, except the draw. The draw is to be a turntable draw, two hundred and eighty-four feet in length,

supported in the centre by a circular stone pier of solid masonry, leaving an opening on each side of such turntable pier, one hundred and twenty feet in the clear. That such draw is over the main channel and deepest water of the river on the line where the bridge crosses;" and that it is the line of navigation uniformly taken by the boats running up and down.

Except the earth used for the embankment across the Island for the road, but few of the materials for the work have been taken from the Island. The rock on the Island was unfit for masonry, and some of it has been used to fill up the unexposed part of the abutments of the bridge and a small amount of riprap work. The embankment is shown to be half a mile from the principal building at Fort Armstrong. Convenient passage ways have been made under the railroad, so that there is no obstruction to the passage from one end of the Island to the other. It seems that about one hundred and fifty thousand dollars have been expended by the company on the road over the Island and on the bridges. Thirteen acres and a half of the land on the Island appears to be occupied by the road. Several of the witnesses estimate the value of the land without the bridge and the road, at one hundred and fifty dollars per acre; the road being made, and the bridges, they suppose it will be worth one thousand dollars per acre.

One of the witnesses for the defendant states, that he has long acted as pilot for steamboats and rafts over the rapids, and is well acquainted with the river; that for more than half a mile above the bridge, the channel from the draw up is straight, running to the opening in the rocks, known as "Shoemaker's Chain," and that the velocity of the current from the chain to the bridge is little more than two and a half miles per hour.

The piers, except where the draws are placed, are two hundred and fifty feet apart, which affords ample space for rafts, the bridge being elevated above low water some thirty-three feet, and twenty feet above high water.

The falls, it would seem, must, from the rapidity, sinuosity, and narrowness of the channel, present the principal obstructions to the navigation of this part of the river. Rafts or barges attached to

steamboats are loosened, before descending the falls, and they are floated down under the direction of a pilot. This, it is said, is never done in the night, unless the river is high. Whatever improvements may be made in widening this channel, it is hardly probable that it will be extended to double its present width, which would make it equal only to either of the draws below. And if this were done, the passage of the draws over a deep, straight and sluggish current, would be much safer than the rapids. Indeed, from the concurrent views of the witnesses who speak of the bridge where it is being constructed, there will be but little or no delay or hazard in passing the draws. If any injury should result to boats, from any want of attention by the bridge company, or the structure of the draw, they being managed with reasonable care, an action at law may be resorted to, as in other cases of wrong.

Having considered this great case, in regard to the legal principles involved, under the Federal and State governments, the magnitude of the enterprise, the interest of the public in the road, and in the commerce of the Mississippi river, I am brought to the conclusion that the complainants are not entitled to the relief asked; and, therefore, the motion for an injunction is overruled.

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*District Court of the United States, for the Southern District of Ohio.—In Admiralty, July 3, 1855.*

STEPHEN DUDLEY AND OTHERS vs. THE STEAMBOAT SUPERIOR; JAMES M. SEXTON vs. THE STEAMBOAT TROY.

1. In a controversy, in which the question is, whether a steamboat was a foreign or domestic boat, at the time the account accrued, for which the libel is filed, the enrolment made under oath by the managing owner, pursuant to the third section of the Act of Congress of the 31st December, 1792, requiring the enrolment to be made at the port nearest the residence of the owner, is *prima facie* evidence that the boat belonged to such port.
2. The proof afforded by such enrolment, will be held conclusive as to the character of the boat, unless contradicted by clear evidence of the notorious residence of the owner or owners, at a place or port other than that named in the enrolment.

8. The presumption of the knowledge that a boat belongs to the port of its enrolment, as to those who furnish supplies or materials at that port, is strengthened by the fact that it bears on its stern, in conspicuous letters, as required by the Act of Congress, the registered name of such boat, with the port to which it belongs, especially where the evidence is, that such boat made several trips weekly, to and from such port.
4. As to those claiming liens on a boat, as for supplies and materials furnished under the circumstances above stated, proof that they gave credit to the boat, as of a port of another State, will not avail, unless they have used ordinary diligence to ascertain its true character, or fraudulent or unfair means have been used to mislead and deceive them, as to the place to which it belongs.
5. Where a boat has been sold under an order of a Court of Admiralty, and the proceeds paid into the Registry, and the fund is insufficient to pay all the claims against it; on a question of distribution, the claimants will be paid according to their priorities of privilege. Claims of seamen for wages and of material-men, having a subsisting admiralty lien, if the fund is sufficient, will be fully paid. The next class in privilege will be material-men having no lien but that acquired in virtue of a seizure under a State law, who will be paid, pro rata, out of the balance of the fund, without reference to the time of seizure.
6. A claimant, having an original admiralty lien, who has proceeded under a State law, in a State court to enforce it, will be deemed to have waived such original lien, and must rely solely on the lien acquired by the seizure under the State law.
7. For supplies furnished, or repairs made to a boat belonging to another State, there is an undoubted admiralty lien, equivalent to an hypothecation of the boat; but for supplies or repairs at the home port, there is no lien, unless given by State law. It is competent for a State to provide such a lien, and the national admiralty courts will execute a State law for such purpose; but State legislation cannot supersede or destroy a lien acquired by the general maritime law.
8. A master of a boat or vessel, has no lien for his wages as such.

*John Gauson and D. O. Morton*, for libellants.

*Passett & Kent*, and *Willey & Carey*, for respondents.

The opinion of the Court was delivered by

LEAVITT, J. — The questions before the Court, in these cases, being substantially the same, it is not deemed necessary to give them a separate consideration. The principles to be settled apply alike to both, and will be carried out in the decrees to be entered, although the facts of each case are not wholly identical. In the first named case, the libellants filed their libel in this Court, on the 28th of October, 1853, claiming a balance of \$1875 97, for

supplies and materials furnished at the port of Buffalo, in the State of New York, averring that the Superior, during the period included in the account, was running between ports and places on the shore of Lake Erie, lying in different States, and that she belonged to a port in Ohio. Many intervening claims—upwards of forty in number, and amounting, in the aggregate, to \$22,654 23—have been filed under the original libel, consisting of claims for seamen's wages, repairs, supplies and materials, and one by mortgage. The interveners are residents either of Ohio or New York, with the exception of one residing at Erie, in the State of Pennsylvania. Under the original libel, in the case of the Troy, there are some forty interveners, all residents of Ohio and New York, whose claims amount, in the whole, to \$17,728 11, and embrace the same classes and descriptions as those against the Superior.

Without detaining to notice the previous proceedings and orders in these cases, it will be sufficient here to state, that at the April term, 1854, of this Court, by the consent of all the parties in interest, an interlocutory order was entered for the sale of these boats, and directing that the proceeds should be paid into the registry, subject to the future order of the Court, for their apportionment and distribution. At the succeeding October term, the marshal returned that the Superior had been sold for \$5,700, and the Troy for \$6,610; the amount, in each case, being altogether insufficient to satisfy the claims exhibited respectively against them.

From the number and diversified character of the claims presented, and the complicated questions of priority likely to arise, in the distribution of the proceeds, at the October term, 1854, upon the application of the parties, the cases were referred to H. B. Carrington, Esq., as a special commissioner, to inquire into and report upon the character of the various claims exhibited, and the order of their priority. The commissioner, in the discharge of his duties, at the late term of this Court, submitted a full and elaborate report on the various matters referred to him, which, from its fullness and general accuracy, has greatly aided in the



right understanding of the claims and interests of the contending parties.

The questions now before the Court, for its decision, arise on exceptions to the findings and conclusions of the commissioner.

The first inquiry presented, and one which most materially affects the standing and interests of these parties, in a Court of Admiralty, relates to the port or place to which these boats belonged, during the periods embraced in the accounts now exhibited as maritime claims. The commissioner has reported, as his conclusion, from the evidence before him, that from the autumn of 1852, till the 5th of June, 1853, they belonged to Buffalo, in the State of New York, and that from the last named date they were Ohio boats. As the result of this finding, the claimants residing at Buffalo, whose accounts run from the fall of 1852 till the 5th of June following, would be domestic creditors; and as such, would have no maritime lien on the boats, other than that given by the local laws of New York and Ohio. On the other hand, the creditors resident in Ohio, whose accounts run during the time stated, would be foreign creditors; and as such, have a lien under the general maritime law.

The facts on which the commissioner bases his conclusions, as to the character of these boats, may be briefly stated as follows:—The Superior was purchased by William H. Forsythe, at Buffalo, in the fall of 1852, and was fitted out and equipped at that place, under his immediate superintendence, during the winter and the early part of the spring following. It was enrolled at Buffalo, as of that port, on the 5th of March, 1853; and subsequently, on the 2d of May following, as of the same place. These enrolments were made by Forsythe, the principal owner, under oath, in accordance with the third section of the Act of Congress of the 31st of December, 1792, which requires, among other things, that the enrolment shall be made at the port nearest the residence of the owner. Forsythe, at the time of the enrolments, had the sole management of the boat; his co-proprietor residing at Cleveland, in the State of Ohio. After it was equipped and enrolled, as required by the Act of Congress referred to, the name was put on its stern, as

follows: "*Superior, of Buffalo.*" Early in June, 1853, it ceased to run to Buffalo, and from that time was employed in running to and from Cleveland and Toledo, in Ohio.

The Troy was also enrolled at Buffalo the 26th of October, 1852, as of that port, upon the oath of Forsythe, as the managing owner, having at the time an interest of three fourths in the boat; the other fourth being owned by a resident of Buffalo. Upon the stern, the words, "*Troy, of Buffalo,*" were conspicuously painted. It had been previously enrolled as of Toledo, Ohio; the change in the enrolment having been made after the purchase by Forsythe and his co-owners. In October, 1853, both the boats were mortgaged by Forsythe, and the mortgage was recorded at Buffalo.

In addition to the foregoing facts, bearing directly on the question of the character of these boats, during the period referred to, the depositions of several witnesses were taken, in relation to the residence of Forsythe, the principal and managing owner of the boats. From these depositions, it appears, that Forsythe at the time was an unmarried man, of somewhat irregular habits; and, although his parents resided in Ohio, he seems not to have had any fixed or notorious residence. It is not strange, therefore, that there should be some conflict in the evidence, touching his residence. I do not propose to analyze this evidence, with a view to show in what direction the scale preponderates. It is sufficient to state, that in so far as Forsythe may be deemed to have had any place of residence during the period in question, the weight of the evidence sustains the conclusion of the commissioner, that it was at Buffalo. It is true, the oral testimony of Forsythe on the hearing, if accredited, would lead to a different result; but, for reasons not necessary to be stated, but which will be obvious to those acquainted with the facts, the Court cannot do otherwise than to view his statements as wholly unreliable.

Under the circumstances of this case, it is clear the enrolments of these boats are prima facie evidence that they belonged to the port of Buffalo at the time of their registry. It is true, in controversies between the owners of a vessel, involving a question of title merely, the enrolment is not even prima facie evidence.

When offered to show title or proprietorship in the person making it, it is wholly inadmissible as evidence, for the reason that it is proof only of his acts, and cannot be received against other parties. But, upon an incidental question, not affecting the title of the parties, it is competent evidence: and unless contradicted by clear evidence, will be held conclusive as to the port or place to which the vessel belongs. Evidence of the notorious residence of the owner, at a place different from that stated in the enrolment is doubtless admissible, and may be available in contradiction of the enrolment. But, in this case, there is no proof for which this effect can be fairly claimed.

In the case of *Tree* vs. *The Indiana*, Crabb's Rep. 479, the enrolment seems to have been regarded as conclusive evidence of the port to which the vessel belonged. The facts were briefly these; the vessel was built and owned in New Jersey, and was enrolled by the owners at Egg Harbor, in that State, as of that port. Subsequently, a citizen of Philadelphia purchased a part of the vessel, and, on this change of ownership, it was enrolled at that place, and as of that port; the other owners still residing in New Jersey. It was insisted that it belonged to that State; but the Court held, that from the date of the enrolment at Philadelphia, the vessel was of that port, and not of the port in New Jersey, where a majority of the owners resided.

It is urged however, that the creditors of these boats residing at Buffalo, aided in the repairs, and furnished supplies and materials, under the belief that they were foreign and not domestic boats, and that they are to be regarded, in controversy touching their interests as creditors, as having the character which they supposed them to possess. This is doubtless the true doctrine, if fraud or unfair means have been used to lull the vigilance of the party giving the credit, or mislead or deceive him, in respect to the real character of the boat or vessel. There is however, no evidence in this case, that any such means were resorted to. It is true, a card purporting to have been issued by Forsythe and another person, announcing that they had commenced the forwarding and commission business at Cleveland, in the State of Ohio, has been offered in

evidence. It is not material to decide, whether this can be received as evidence, unaccompanied with proof bringing home the knowledge of such business arrangement to the persons giving the credit at Buffalo. There is no proof of this character offered, and no ground therefore for the inference or presumption that the card referred to could have misled them in reference to the true character of the boats as foreign or domestic. The enrolments of the boats were of record in the Custom House at Buffalo; and slight diligence would have enabled those interested to know to what port or place they belonged. Besides—these boats during that part of the season of navigation in which they were engaged in the Buffalo trade, arrived at, and departed from that port, several times every week, bearing on their sterns the significant announcement, and giving to all, a standing notification that they belonged there.

The evidence therefore clearly warrants the conclusion, that these boats did, in legal estimation, belong to Buffalo, up to the 5th of June, 1853, when it was notorious they were wholly withdrawn from that trade, and were thenceforth during that season employed between ports and places within the State of Ohio. As a consequence, those who aided in repairs or furnished supplies and materials at Buffalo, prior to the 5th of June, can be viewed, under the circumstances stated, in no other light than as domestic creditors, and as such, have no lien other than that given by the Statutes of New York and Ohio. Subsequent to that date, they occupy the position of creditors of foreign boats, and their rights as such will be recognized and enforced. And, as a further result, the Ohio claimants, whose accounts date from the time of the enrolments of these boats to the 5th of June, 1853, occupy the standing of creditors of foreign boats, and as such have a clear admiralty lien, which will be enforced, as to those who have not waived such lien by resorting to the local law of Ohio, for the recovery of their claims. From the report of the Commissioner, it appears that many of the Ohio creditors who, in accordance with the conclusion just stated, had a clear maritime lien on the boats, independent of that given by the local law, have proceeded to obtain seizures of the boats under that law, and by process from the State Courts. They have

included in their claims, not only materials, supplies, etc., furnished these boats while they were, to them, boats of a home port, but also such as was furnished while they were of a foreign port. I have found no reported case settling decisively the effect on the rights of a party, having an admitted admiralty lien, who voluntarily waives that lien and resorts to the local law for his indemnity and protection. There can be no question of his right to do so; but I suppose, in analogy to the doctrine of waiver, as applicable to other cases, that the party thus abandoning his maritime lien, as before stated, cannot resume it at pleasure, and thereby be reinstated in his original rights. Without knowing how, or to what extent, this principle may affect the interests of the numerous claimants in these cases, I am inclined to sustain it; and the decree to be entered will be framed accordingly.

In this posture of these cases, the important question arises, on what principle is the distribution of the proceeds in the registry to be made? Concerning the claims for seamen's wages, there is no controversy. It is conceded, they must be first paid out of the funds on hand. The next class in the priority of privilege, are the material-men. As before stated, some of these are residents of Ohio, some of New York, and one of Pennsylvania. Some claim, as the creditors of a foreign boat, and rely on their general admiralty lien—and some claim under liens acquired by virtue of the law of Ohio. The proceeds in the registry, it appears, will not pay more than fifty per cent. of the claims reported by the Commissioner, as constituting liens on the boats. After paying seamen's wages, the Commissioner has adopted the conclusion, that the material-men, whether having original admiralty liens, or liens acquired by seizure under the statute of Ohio, occupy the same rank of privilege, and must be paid pro rata, so far as the proceeds will reach. And, this view is concurred in, by the proctors representing a large number of the claimants.

The question here indicated, is certainly one of great interest, and I regret to say, I am aware of no authorities bearing directly on it. In some of its aspects, as applicable to the present case, the pro rata rule of distribution insisted on, seems just and equita-

ble; and, I would cheerfully adopt it, if it did not conflict with what I suppose to be, the settled doctrines of the maritime law. I am not prepared for, and therefore shall not attempt, an extended discussion of the principle involved in the inquiry before stated. I shall content myself with a very brief statement of some of the reasons which occur to me, against placing all the material-men, who are claimants in this case, on a footing of equality, and applying to all, the pro rata rule of distribution. It is obvious to me that there is a clear distinction between those claimants for repairs made or supplies and materials furnished to these boats as boats of a foreign port or State, for which a lien or privilege attaches by virtue of the general maritime law, and those which exist only by seizure under the local law of a State. The former have their origin in the fact, or the presumption of the fact, that the credit is given, not to the owner or master, but to the vessel; and by the admitted doctrine of the maritime law, it attaches from the time the credit is given, and is equivalent to an express hypothecation of the vessel. It adheres to the *res*, as a subsisting and efficient lien, wherever it goes, and into whosoever hands it may pass. Not so, however, in regard to credits given in a home port. These are supposed to be, on the credit of the master or owner, and do not import a lien on the vessel, unless provided by express legislation of the State in which the credit is given, and on grounds unknown to the general maritime law. The right of a State thus to legislate has long since been conceded by the highest Court of the Union; and, it is equally well settled, that where such lien is created by a State law, it may be enforced in the admiralty courts.\* But I am not aware that it has been anywhere admitted, that state legislation can interfere with, supersede or destroy, a right or lien previously acquired under the national maritime law. On the contrary, the existence of such a power in the States, has been strongly denied. They may declare that a lien shall exist, in cases designated, and provide for its enforcement, by a seizure *in rem*; but, clearly the lien so acquired, must be subordinate to those existing before, in favor of other parties. Under the water craft law of Ohio, there is no lien, till after the seizure of the *thing*. To hold, that this

lien places the attaching creditor on a footing of equality with one who has an admitted maritime lien on the same vessel, would be virtually to set aside the claim of the latter, and wholly to defeat his rights. Such, at least, in cases like the present, where the proceeds of sale are not sufficient to pay all the claims against the vessel, would be its virtual effect. I cannot suppose that such a result was intended by the Ohio Statute; but if admitting of such a construction, it implies the exercise of a power by the Legislature, in conflict with the Constitutions and Laws of the United States.

But, without pursuing this subject further, I will state, as the result of my reflections on the question stated, that in determining the mode of distribution of the funds in the registry, there must be a discrimination in favor of those claimants who have a subsisting maritime lien, and those who subsequently acquired liens, by seizures under a State law. There is certainly a fallacy in the argument by which the conclusion is reached, that because those having these statutory liens, are material-men, they are to have the same priorities of privilege, as those who have previous maritime liens. The origin and nature of these liens must be regarded in fixing on a rule by which distribution of the proceeds shall be made. Such, I understand to be the rule sanctioned by the learned judge of the District Court of Maine, in the case of the *Paragon*, Ware's Reports, 322. He says, "where all the debts hold the same rank of privilege, if the property is not sufficient fully to pay all, the rule is, that the creditors shall be paid concurrently, each in proportion to the amount of his demand. But, when the debts stand in different ranks of privilege, then the creditors who occupy the first rank, shall be fully paid, before any allowance to those who occupy an inferior grade."

Being, as I think, warranted in the conclusion, that the class of claimants, in whose favor there exists a present, valid maritime lien, are entitled to a priority in the disposition of the funds in the registry, I shall decree, that such be first paid, without reference, as between them, to the order of time in which their claims respectively accrued. After excluding those claimants who have abandoned their maritime liens, by resorting to seizures under state



process, there will be but a small number, occupying the first rank of privilege among the material-men. It appears however, from the analysis of the claims submitted by the Commissioner, that there are some of this description. These will be ascertained by reference to the report; and full payment will be decreed to them, so far as they have admiralty liens. The claim of George F. Morton, of Erie, Pennsylvania,—the boats being foreign as to him—will be included in the class of privileged claims to be first paid.

The claims for seamen's wages, and the preferred class of material-men being provided for in the decree, those who have acquired liens by seizure under the law of Ohio, will constitute the next class. These will be paid pro rata, from the funds remaining, without reference to the order of time, in which the seizures were made.

It is proper to notice, that the claim of James M. Sexton, the original libellant in the case of the *Troy*, embraces an account for wages, as master of the boat, and also as mate. It is clear, that upon no principle has the master a lien on the vessel for his wages. This part of the claim is therefore rejected; and the decree will embrace only the amount due him for wages, as mate.

These are the only material points presented on the exceptions to the report of the Commissioner. A decree in each of the cases will be entered in accordance with the principles before stated.

The libels filed by interveners, having neither an admiralty lien, or a lien by seizure under the Ohio Statute, are dismissed at the costs of the libellants.

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#### LEGAL MISCELLANY.

#### LEGAL PRINCIPLES.

#### No. VII.

In our last, we had occasion to observe, that the more close and accurate our investigations, the fewer exceptions we find to the various principles of the law. It may be added, that the fewer in number we perceive the elementary legal principles to be.

All things are resolvable into a few original elements ; truth is so, and legal truth is no exception to the rule. For example, the various maxims of the law, which have come down to us from our forefathers, in their ancient dress of Latin and barbarous French, are often looked upon as original legal principles. So, indeed, many of them are ; but many, also, are mere offshoots from others, being only secondary, or consequential, steps of reasoning, or fragmentary expressions of what in other maxims is expressed in more broad and comprehensive terms. Thus the maxim, famous in insurance law, and much regarded in some other departments of jurisprudence, *Non remota causa sed proxima spectatur*, is only a particular statement of a larger truth more accurately expressed in the comprehensive words, *De minimis non curat lex*. Now this latter maxim, that the law does not concern itself about small things, is universal ; not, indeed, to be applied to every question, but to every case and circumstance which, in its own nature and in the nature of jurisprudence, it will *fit*. And a close examination of the matter will doubtless show, that the reason why the law does not regard the remote, but only the proximate cause, as expressed in the former maxim, is that the remote cause is too small a thing for it to notice. When, however, the remote cause is not too small, the law does regard it ; and hence we read of exceptions to this maxim. But if we sink this maxim, and adhere only to the other more comprehensive and more accurate one, we gain two objects—first, we reduce the number of our legal principles ; and secondly, we get rid of encumbering our minds most unsatisfactorily with exceptions.

We have brought forward this illustration merely to enforce the general idea, that we should always resolve back propositions in the law as far as possible to their original elements, which elements only are to be regarded properly as legal principles.

There is the same difference between a mere legal truth and a legal principle, as between the trunk and twig of a tree. And one of the most important arts of our profession is to distinguish twigs from trunks. Legal trees are to be ascended. We are to find, and know, and remember where are located, the trunks ; from which we may go up at pleasure to the twigs.

But discarding all figure of speech, when we have presented to us what we know to be a legal truth, our care should be to ascertain whether it be an elementary truth. Can it be traced to a doctrine, more general and universal, of which it is a secondary form? If so, what is that doctrine, and what other secondary forms have arisen from it?

Now, suppose we have thus found what appears to be a general first principle. We trace out that principle to its various consequences. Are those consequences such as the adjudications of the courts show us to have an actual existence in the law? If we see, on the comparison, that our supposed principle, traced in every direction, leads to consequences precisely in accordance with the facts of the law as exemplified in the decisions of the Courts, we conclude that it is true and sound; in other words, that it is a legal principle. In so comparing our deductions with the decisions, we do not inquire, as being material, whether or not the judges, in arriving at the decisions, have recognized our principle. If they have, we may still find that it is erroneous; if they have not, we may yet find that it is correct.

But suppose we discover a single case or two not in accordance with the deductions from our principle. Such a case will cast suspicion on the principle; yet still the case may be wrong. It would be impossible to lay down any exact rule as to how many adjudications would suffice to show a supposed principle erroneous. Two things might, however, happen together—that the principle would be right; and, at the same time, that a series of adjudications, which could not be overthrown, would be found to conflict with some inevitable deduction from it. Here we should be obliged to admit, that there was an *exception* to the principle—a matter which we discussed in our last number.

These hints will serve, in some degree, to satisfy the inquiry, how legal principles are to be learned. But it may be objected, that such a process of learning them, so laborious and slow, could only be gone through in one's lifetime. This is undoubtedly more than true. No man's life would be long enough for a thorough acquisition of them all; just as no individual could master, as a first discoverer,

all that is known of any other one science; but each succeeding man reaps, in a large measure, from the sowing of his predecessors. Judges, by their suggestions of leading principles, aid us; the writers of our text books should, and a few of them do, aid us still more. And if the time ever comes when this subject receives from the profession the attention which, either as a practical matter or a matter of science, it merits, we shall find men who will devote their lives to such discoveries and elucidations of legal principles as will leave the labors of those who follow after comparatively light.

J. P. B.

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## ABSTRACTS OF RECENT AMERICAN DECISIONS.

### *Abstracts of Illinois Cases.<sup>1</sup>*

**Action.**—Where A. agreed to deliver B. all the lumber which A. should make at his mills within a specified time, at a fixed price, of which one hundred dollars was paid at the execution of the agreement; A. failed to perform, whereupon B. sued upon the special agreement and recovered judgment; afterwards B. sued for money had and received, to recover the \$100, paid on the execution of the agreement; HELD, that the former proceedings and judgment were a bar to a recovery in the second action. *Dalton et al. vs. Bentley.*

**Agent.**—Where a number of persons are intrusted with powers in matters of public concern, and all of them are regularly assembled and consulting, the majority may act and determine, if their authority is not otherwise limited and restricted. *Louk vs. Woods.*

In such case where a report is only signed by two of three viewers of a road, it will be presumed that the third was present and consenting, until the contrary is shown. *Id.*

**Assignment.**—Property, in the hands of an assignee, for the purpose of paying creditors, cannot be reached by attachment or garnishee process. *Kimball vs. Mulhern et al.*

**Autrefois Acquit.**—A person indicted for murder may be found guilty of manslaughter, and such finding amounts to an acquittal of the charge of

<sup>1</sup> We are indebted to the learned Reporter, E. Peck, Esq., for the early sheets of 15 Ill. whence these abstracts are taken.

murder, and the accused cannot again be put on trial for murder. *Brennan et al. vs. The People.*

A verdict of acquittal or conviction is a bar to a subsequent prosecution for the same offence, although no judgment has been entered upon it. *Id.*

In an indictment for murder, and a verdict found for manslaughter, if the accused seeks and obtains a new trial, he will only be tried for the offence of which he was found guilty. *Id.*

*Bailment.*—In an action against a common carrier to recover the value of goods not delivered; it is HELD, that the evidence of a witness, who states that he knows the goods were carefully packed, and that he saw them taken away by a drayman, and saw the bills of lading after they were signed, giving the particular facts of his knowledge, is proper for the consideration of the jury, and may be held as sufficient evidence of the fact that the goods were shipped and in good order. *Scholes et al. vs. Ackerland et al.*

Carriers should show a delivery in good order in pursuance of the contract in the bill of lading; something more than putting goods on shore or on a wharf, must be shown. Notice to the consignee, or some excuse for not giving it, and a reasonable time, should be given to attend and receive the goods. *Id.*

Carriers by coasting vessels, should, on landing goods, give notice to the owner, of the fact, or if to be delivered to a consignee, and he refuse to receive them, the carrier must safely secure them, or he will be liable for any loss that may occur. *Crawford et al. vs. Clark et al.*

*Dedication.*—The public is an ever-existing grantee, capable of taking dedications for public uses, and its interests are a sufficient consideration to support them. *Warren vs. Jacksonville.*

Parol dedications are good. *Id.*

The intention of a party, manifested by express consent, or acquiescence in the user, will govern in determining what is a dedication. *Id.*

Privies in estate will be bound by the deeds and acts of their grantors, and they cannot resume a grant after the public has entered upon its use, while the use continues. *Id.*

*Easement.*—No inference or conclusion will be drawn in this State against the owner of land lying unenclosed, which is travelled over, to establish an easement in favor of the public. *Warren vs. Jacksonville.*

*Indictment.*—Where several persons are jointly indicted, they cannot, as a matter of right, have separate trials; this allowance is in the discretion of the court, and cannot be assigned for error. The peremptory challenges

of the accused are not abridged or affected by a joint trial. *Maton et al. vs. The People.*

*Marshalling Assets.*—While a court of equity has undoubted authority to compel one creditor to satisfy his debt out of a particular fund to which he alone can resort, yet it will never do this to the injury of such creditor, or where that course will work injustice to the other parties. *Morrison vs. Kurtz.*

While the court possesses this power, it by no means follows that it will always be exercised. It is the primary duty of the court to protect all of the creditors in their just rights, and also the rights of others. *Id.*

Partnership estate should be first exhausted to pay partnership debts, before resort is had to the separate estates of the partners. And the separate creditors are entitled to be first paid out of the separate estates of the several partners. *Id.*

*Master and Servant.*—The principal is not liable to one servant for the carelessness of another servant, where both are engaged in his business. *Honner vs. Illinois Central Railroad Co.*

An action will not lie by a servant against his principal for injuries sustained by the carelessness of his fellow servants. *Id.*

The doctrine of *respondeat superior* does not extend to the case of an injury received by one servant through the carelessness of another. *Id.*

*Murder.*—A person may be guilty of murder although he took no part in the killing, nor assented to any arrangement having for its object the death of another, if he combined with those who committed the deed to do an unlawful act, such as to beat or rob, and death ensued in consequence of the attempt to execute the common purpose. *Brennan et al. vs. The People.*

If several persons conspire to do an unlawful act, and death happens in the prosecution of the common object, all are alike guilty of the homicide. The act of one is the act of all, although some are not present. *Id.*

*Railroads.*—A passenger was taken on the train of the Galena and Chicago Union Railroad Company, to be transported for a short distance; he was told that the passenger cars were full, and that he must ride in the baggage car; he commenced playing with his companions; obtruded into the passenger car; when that car was thrown from the track, he leaped from it, and was injured: HELD, that he could not recover for this injury. *Galena and Chicago Union Railroad Company vs. Yarwood.*

*Ships and Shipping.*—The lender of money to the master of a vessel,

to aid in making repairs, or to purchase supplies, must see that the amount advanced is reasonable and necessary. *Leddo et al. vs. Hughes.*

The ports of the different States, under the maritime law, are, in respect to each other, foreign. *Id.*

The maritime law has no application to flat boats, their pilots or navigators. *Id.*

The lien given under our statute for repairing, &c., may arise upon contracts expressed or implied, and the acting master or supercargo may bind the vessel; but the party making the advances must show the necessity for them, and the proper application of them. *Id.*

*Tax.*—A tax is not an ordinary debt; it takes precedence of all other demands; and is a charge upon the property, without reference to the matter of ownership. *Dunlap vs. County of Gallatin.*

The property itself may be seized and sold, although there may be prior liens or incumbrances upon it. *Id.*

The State is not bound to wait until the estate of a deceased person is administered, and then participate with other creditors in the proceeds, but may enforce payment to the exclusion of all other creditors. So of an insolvent estate in the hands of trustees. *Id.*

The remedy by distress, for the collection of taxes, is not necessarily exclusive. *Id.*

*Trover.*—Castrating a scrub hog from running among other hogs, is not such proof of a change in property, as to be evidence of a conversion or appropriation of the hog by a party, to his own use. *Byrne vs. Stout.*

*Warranty.*—No particular form of words is necessary to establish a contract of warranty, but it must appear that the party binds himself to make good the quality of the article sold, and that this made a part of the consideration. *Adams et al. vs. Johnson.*

## ABSTRACTS OF RECENT ENGLISH DECISIONS.

*Admiralty—Collision—Bail.*—An action was entered for the sum of £250, in a cause of collision, and bail in that amount was given for damages and costs. The costs, however, subsequently raised the amount recovered, beyond £250. The Court under these circumstances of the case, the additional costs having been incurred through the fault of the claimants, decreed them to be personally liable for the amount exceeding the bail. *The Termisonata*, 19 Jurist, 479, Admiralty.

*Arbitration—Action.*—*Quære*, whether an action will lie against an



arbitrator for anything done by him while acting strictly in that capacity. *Jenkins vs. Bentham*, 24 L. J. Common Pleas, 94.

*Contract—Wages.*—To an action for money paid at the request of the defendant, it is no answer that the money was paid in discharge of claims against the defendant under wagering contracts, void by statute. *Knight vs. Cambers*, 24 L. J. Common Pleas, 121.

*Contract of Sale.*—Plaintiffs agreed to sell the defendant a quantity of hoop iron to be manufactured in Staffordshire, and delivered in January and February, at Liverpool. The iron was to be forwarded by canal boats, vessels, and carts. Iron so forwarded at the period of the year in question, necessarily suffers some deterioration by being rusted. The iron in question, which was clean and bright when put on board, arrived at Liverpool in a rusty state, and acceptance of it was refused by the defendant. *Held*, that the defendant was bound to accept the iron, if it was only so far deteriorated as it would necessarily be in its transit from Staffordshire to Liverpool; and that a direction to the jury that the defendant was entitled to have it delivered to him at Liverpool in a merchantable condition, was wrong. *Bull vs. Robison*, 24 L. T. Ex. 165.

*Costs—Errors—Coram nobis.*—A party is not entitled to the costs of recovering a judgment in error in fact. *Marshall vs. Jackson*, 19 Jurist, 447, Queen's Bench.

*Criminal Law—False Pretence.*—The defendant obtained goods from the prosecutors, by pretending that he wanted them for J. S., whom he represented as an iron-monger living at N., to whom he would trust £1000, and who went twice a year to New Orleans, to take different kinds of goods to his sons there. Upon the trial of an indictment for obtaining goods by false pretences, the jury found that all the representations were false, and that the prosecutors believing that the defendant was connected with J. S., and employed by him to obtain the goods, contracted with the defendant, and delivered the goods to him for himself, and not for J. S. Verdict of guilty, *held* right. *Reg. vs. Thos. Archer*, 19 Jurist 479, Court of Criminal Appeal.

*Criminal Law—Neglecting to Maintain Child.*—If a woman be indicted for neglecting to supply her infant bastard child with proper food, and it be alleged that she was able, and had the means of supporting it, it is not enough to show that she might have obtained the means if she had applied to the relieving officer of the Union. *Reg. vs. Keith*, 24 L. J. Mag. Cases, 109, Court of Criminal Appeal.

## NOTICES OF NEW BOOKS.

**A Treatise on the Equitable Jurisdiction of the Courts of Pennsylvania, with Notes of Pleading and Practice in Equity, and an Appendix of Practical Forms. By Frederick C. Brightly, Esq. Philadelphia : Kay & Brother, Law Booksellers and Publishers. 1855. pp. 750.**

The Pennsylvania Bar have long wanted a local book on Equity Jurisprudence. Mr. Brightly has now supplied this want in a manner that cannot fail to be satisfactory to his professional brethren, and to advance his already well-earned reputation as an author and editor.

The first book of this treatise is devoted to Equity Principles, and the second to Equity Pleading and Practice. And the Forms most practical and important are collected in the Appendix, thus giving to the practitioner in small compass all the information that is of every-day use, and enabling him readily to advise upon principles and to draft papers.

From the examination that we have been able to give this volume, we feel no hesitation in commending it to the careful study of the Equity student and practitioner, as well out of Pennsylvania as in, as a work embodying within its pages the most useful learning, clearly and ably set in order. The typographical execution is admirable; the page of good size, type large, and the text clear. It is a valuable contribution to Pennsylvania law, and to the general student in Equity, an indispensable handbook.

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**A Digest of Cases decided in the Supreme Court of the State of Illinois, from 1819 to 1854, including the fourteenth volume of the Illinois Reports, together with tables, titles and references, by Elliot Anthony, Counsellor at Law. Philadelphia : T. & J. W. Johnson. Chicago, D. B. Cooke & Co.; Rock Island, H. A. Porter & Bro. 1855. pp. 745.**

Some months ago, a few of the earlier sheets of this book were submitted to our inspection, whence we argued a satisfactory work; and a further inspection, so far as we can judge from our limited knowledge of the jurisprudence of Illinois, confirms this opinion. The merits of a Digest consist principally in accuracy and arrangement, and use alone can enable one to form an opinion of its real worth.

THE

# AMERICAN LAW REGISTER.

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SEPTEMBER, 1855.  
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## THE CODE NAPOLEON.<sup>1</sup>

The five codes which form the present written basis of jurisprudence in France, are, by such superficial thinkers as Alison, attributed to the first Consul, who was, perhaps, as incapable of aiding materially in their production, as of solving the mysteries of the immaculate conception. An American believer of such an absurdity will not be readily convinced that these five codes in substantially their present form, would have been the present law of France, if Napoleon had never lived, or had been killed at Toulon, or buried at the base of the pyramids of Egypt. If a truth like this be told plainly to this credulous reader of the fables, now called history, he will, perhaps, with a sneer of incredulity, refer to statements of Alison, or to the quotation by General Cass, of a complimentary observation made by Cambacères, who was

<sup>1</sup> The following extracts from articles lately published in the editorial columns of the *Pennsylvanian* newspaper, under the head of "The Province of the Future Historian," have been arranged for this article in such a manner as to present a brief outline of the compilation of the French "FIVE CODES," and a fuller history of that of one of them, the CIVIL CODE, ordinarily denominated the CODE NAPOLEON. The effect of the first paragraph is dependent, in part, upon its connection with portions of the original publication which are not inserted here because they have no relation to any subject of jurisprudence.

himself the primary compiler of the Civil Code, upon the part taken by Napoleon presiding as first Consul at some of the discussions in the Council of State, on the revised draught of one of the five codes. The name of this code,—called the “Code Napoleon” as the compilations of Tribonian and his coadjutors bear the name of Justinian,—and this complimentary remark of Cambacères, who had worked in its preparation before the name of Napoleon was known beyond the roll call of his regiment, have been hastily relied on by intelligent Americans, as confirmations of the impressions of Alison, who, in his laborious investigations, never penetrated far below the external surface of historical materials, of which he understood the *selection* better than the *use*.

In order to exemplify the fallacy of the man-worshipping method of historical investigation which we have thus ventured to condemn, we propose to demonstrate from authentic materials, that the conception or plan of none of the five codes, was, in any degree, Napoleon Bonaparte’s; and that the part which he took in executing the plan as to the one code which bears his name, however serviceable in the promotion of his own selfish interests, was in itself of insignificant importance to the promotion of the work. We will, incidentally, explain the mode in which the hastily conceived impression that he took an important part in its promotion, probably originated.

At the commencement of the French Revolution, in 1789, the experiment of codification in modern Europe was not a novelty. It had already to some extent been tried in Bavaria, in Prussia, and in Austria; and had also been tested in France herself. In 1667, France had, in the ordinance of procedure, established the basis of one of the five codes, that of “civil procedure.” This code, promulgated on the 24th April, 1806, was founded upon the ordinance of procedure of 1667. The ordinances of 1673 and 1681, forming a complete code of commerce and navigation, were in full force until the promulgation of the code of commerce of September, 1807, another of the five codes. This code superseded these ordinances, by re-enacting their provisions with modifications and extensions, rather than with any radical alterations. Commercial codes, embodied in prior ordinances of other countries of Conti-

mental Europe, have been published in English translations by Magens and Judge Peters. The French penal code, and code of criminal procedure, promulgated under the Empire, are generally recognized as having been results of the legislation of the Constituent Assembly. Trial by jury in criminal cases, which now prevails in France, and a penal code, with "a complete instruction on criminal procedure" were introduced before the end of the year 1791. "The code of crimes and punishments" was promulgated in 1795, before Napoleon Bonaparte had possessed any other than a simply military rank or station. His name has indeed never been connected with any of the four codes,—called the commercial code, the penal code, the code of civil procedure, and that of criminal procedure. It only remains, then, to consider the question with reference to the civil code, which honorarily bears his name.

The motive of the preparation of the civil code, was not the introduction of a new system of jurisprudence, but the removal of those uncertainties as to the legal doctrines in force which had constituted the principal evil of the former system. The remedy consisted first in devising a method of resolving for the future, the perpetually recurring doubts on doctrinal points in which the old system had been involved. The want of a tribunal, whose decisions might be received as of authority throughout France, had been a principal cause of the retention of those diversities in the local customs, which had formerly regulated the different territorial divisions of the country. The first remedy applied by the National Convention, was, therefore, the removal of the cause of these multifarious uncertainties of doctrine, by constituting, in the newly created tribunal of Cassation, a Court in which the judgments of the Courts of Appeal of all the several departments might always be reviewed. This tribunal, established by the National Convention as early as the year 1790, gave to France the benefit she has ever since enjoyed, of a secure standard of authority, the advantage of which had been tested by experience in England and in America. If France had always had such a standard of authority, and had fully comprehended the advantages of that progressive improvement of the law, which is derivable from adhering to the

decisions of such a tribunal, as precedents for the decision of other cases, there perhaps would not have been occasion for the general codification of the civil jurisprudence of the nation. In the existing state of her jurisprudence, there was, however, an obvious necessity of adopting such a measure in connection with the establishment of the Court of Cassation, in order to harmonize these conflicting local doctrines. A code framed for this purpose, would furnish secure points of departure, and the Court of Cassation, starting from such points, would, by its decisions, prevent the recurrence of the former evil.

The general codification of the civil jurisprudence, was the subject of one of the "fundamental provisions secured by the Constitution" of 1791. The last article of the first title of this Constitution, was in the words, "There shall be made *a code of the civil laws uniform* throughout the realm." Cambacères, while "a representative of the people" in the National Convention, was a member of "the section of legislation." On behalf of this section, or Standing Committee, he presented to the Convention in 1793, the first draught of the *Civil Code*. The Constitution of 1793 contained, in the 85th article, a provision which, literally translated, was in the words, "The code of the civil and criminal jurisprudence is uniform for the whole republic," meaning, *shall be* uniform. Subsequently, after the organization of the Council of Five Hundred, one of the sections of this Council was, that "on classification of the laws," of which also Cambacères was a member. On behalf of this section, he presented to the Council, in 1795, a new draught of the proposed civil code, and a summary of the laws from 1789 to September, 1795, relating to this code. The late Mr. Duponceau, referring to these publications of Cambacères, and to the part afterwards taken by Cambacères in the discussions upon the code in the Council of State, has often been heard to say that he was the author of the Code Napoleon. If, however, Cambacères had not thus aided the Convention in the work, other competent compilers were at their command. Cambacères, under the constitutions adopted soon after Bonaparte's first *coup d'état* of 18 Brumaire, (9th November, 1799,) became the second Consul. Jacqueminot, a

“representative of the people” in the Council of Five Hundred, at about this time, published a draught of the principal titles of the code, as prepared by the legislative committee of that Council. This Jacqueminot, as “President of the Committee of the Council of Five Hundred,” was one of those who, afterwards, with Bonaparte as First Consul, and the other Consuls, signed the above mentioned Constitutions of the Consular Government, which were promulgated early in January, 1800. In the following summer, a Consular decree nominated Tronchët, Portalis, Bigot-Preameneu and Malleville, Commissioners “to make a comparison of the system, followed in the compilation of the *draughts of the Civil Code hitherto published*, determine upon the plan which they might deem the most suitable for adoption, and afterwards discuss the principal heads of legislation upon civil affairs.” These Commissioners, in their subsequent report, after quoting this decree, say it “is conformable to the purpose declared by *all our national and legislative assemblies*.” This declaration alone, proceeding from such a source, is altogether decisive as to the origin of the plan, and proves conclusively that it was not a novelty. The language used in the commission, compared with the progress then already made in the compilation, sufficiently prove that any government which might have been permanently established, must have proceeded to carry the project of the civil code into effect.

But, at this crisis of Napoleon’s first usurpation of supreme power, adequate motives induced him to expedite the progress of the work. He was young, and had been hitherto known to the public in his military capacity alone. The progress of the codification of the laws under the national and legislative assemblies had propitiously matured the work for his intervention. It was essential to his plans, that his name should be associated with some such measure. In his remark, when an exile and prisoner at St. Helena, that the best monument which he had erected for himself, was the code that bore his name, we may trace the motive which governed him in taking advantage of this favorable opportunity to show himself to France in his newly assumed character of a statesman, participating in the administration of civil government. Precedents in



the Roman Empire of the East, particularly in the case of Justinian already mentioned, and in that of Theodosius, and in those of other Emperors and potentates, had been followed in the modern instance of the Prussian code. This code bore the name of the great Frederic, whom alone of modern strategists, Napoleon regarded as entitled to bear a comparison with himself, or with Hannibal, whom he regarded as the great commander of antiquity. Everything doubtless indicated clearly to his mind, that his name might probably be associated with this code in time to come. He therefore doubtless desired the reputation of an actual, as distinguished from a merely nominal, intervention in the work of its compilation, then far advanced towards maturity. More important motives than are thus to be traced in the characteristic egotism of his insatiable ambition, were however sufficient to account for his intervention in the matter of that intended code. The border line between political and civil jurisprudence, is not always readily discernible. The projected political constitutions, according to those illusory theories of government which he professed, were, at that crisis, dependent, in part, upon a reconstruction of the domestic and social institutions of the country. These interests were sometimes directly, and often indirectly, involved in provisions of civil jurisprudence. He was therefore anxious that the civil institutions of the country should, through this code, be harmonized with the political. If his motives thus explained have been rightly penetrated, his course as to the code will be readily comprehended.

Malleville, one of the Commissioners, tells us that the Minister of Justice, in communicating to them their appointment, informed them that the first Consul desired that the work should be performed in the promptest possible manner; and adds, "we made every effort to fulfil this wish. The arrangement of the titles was soon settled, the matter distributed and the days of meeting appointed \* \* \* for the examination of each Commissioner's work." He says, "the result of our exertions was that we succeeded in producing a civil code in four months." This new draught of the code, with a preliminary discourse by the Commissioners was printed before the end of the following winter. The general course

of Cambacères in the subsequent discussions, indicates that this draught was thus compiled with the aid of those previously published by himself. It was, in the main, an adoption of the text of the Roman law, or its anciently approved glosses, except where the old local jurisprudence was adhered to, because there had been a general uniformity, or some approximation to uniformity, in the doctrines of the different provinces. By this judicious plan, which was generally followed in the repeated revisions which the work afterwards underwent, the Commissioners, with the aid of the previous labors of the legislative sections of the National Assembly and Council of Five Hundred, were enabled to submit this draught of the code at so early a day.

The draught was next submitted to the local Court of Appeal of each of the Departments, then one hundred, or more, in number. These tribunals reported freely their objections, proposed amendments, and made suggestions, which were afterward considered. The draught was also submitted to the Court of Cassation, who also revised it, and reported in detail their views. Afterwards, the original draught of the Commissioners, with all these reports of the Court of Cassation and Courts of Appeal, passed under the revision of the section of legislation of the Council of State, composed of Regnier, subsequently Chief Judge, Berlier, Emmeri, Real, Thibaudau, Murair, the first President of the Court of Cassation, Galli and Treillard. The four Commissioners who had compiled it attended their sessions, at which each title was examined, and was either passed as reported, or amended by a vote of a majority of the Board. When the contents of a projected law had been settled by such a vote, it was printed, *and was then for the first time distributed among all the members of the Council of State.*

This preliminary work seems to have been completed thus far by the summer of 1801, a year after the institution of the commission under the above mentioned Consular decree. Thirty-six laws embracing the whole of the future civil code, appear to have been thus printed for the consideration of the Council of State. *Until after this publication and distribution of the laws, of which the form had been thus far settled, there is no trace of any intervention of the*

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*first Consul*, except his verbal message to the four Commissioners communicated as above, a year before, through the Minister of Justice, urging speed in the performance of the work. The Council of State, when in session upon the code, was presided over, either by Bonaparte, who as first Consul, was *ex-officio*, the President, "assisted by the two Consuls, or, *in his absence*, by the Consul Cambacères." Thirty members, including the eight who had composed as above the section of legislation, participated in the discussions of the Council which ensued. Among them were Regnauld de St. Jean D'Angely, and other eminent jurists, who took important parts in the subsequent discussions.

After the civil code had been thus reported to the Council of State in a matured form, Napoleon's direct participation, such as it was, began. It has been seen that he did not always attend the discussions upon the code in the Council. When at Paris, during the discussion, he was doubtless from time to time apprised of occasions when his attendance at the Council to preside at these discussions, might be serviceable to his interests or his designs. On such occasions, when a clause of the code was in question, he was probably, at the same time, always furnished with all the printed matter bearing upon it, including the reports of all former discussions, &c. His intervention in the discussions was usually, if not invariably, upon questions in which, directly or indirectly, some political interest was more or less concerned. On such occasions, he, when present, expressed freely his opinion. When he gave reasons for it, they were cogent, and, according to the reports, were expressed with clearness and precision. But, as compared with Cambacères, or with Portalis, or with some others, the extent of his intervention was limited. Of course, what occurred was creditable to the sagacity of the first Consul; it indicated that intellectual power of which he was unquestionably the possessor. But he did not exercise either authorship, or general direction, or special supervision over the work.

The four Commissioners who had compiled the last draught of the code, and had attended the sessions of the legislative section, were, during these discussions, always called on to attend the ses-

sions of the Council. "Every one of the members or compilers was at liberty to make his observations; and the presiding officer declared the result *according to a majority of the votes.*"

The form of a law having been thus determined, it was transmitted from the Council to the tribunate, where it was again the subject of consideration and of discussion. The views of the tribunate were then reported to the Council of State, who passed upon such amendments as the tribunate had suggested. After the proposed law had been thus again passed upon in the Council of State, it was presented to the legislative chamber. Before this final stage of the business, "the motives" of each of the proposed laws had been set forth at length, in published discourses, by "the orators of the government, and of the tribunate," among whom this duty was either apportioned by their superiors, or divided by themselves, analytically. Portalis had, in the meantime, at the expiration of about a year from the commencement of the discussion in the Council of State, prepared a revised draft of the code, with a superadded preliminary book of definitions, of which, however, scarcely any portion was adopted.

After four years of discussion under the consular government, when all the thirty-six acts had been passed by the legislative chamber, they were, in the year 1803, just before the establishment of the empire, consolidated into a single body of laws, under the legal title of "CIVIL CODE OF THE FRENCH." This code contains in the whole about as much matter, in bulk, as a fifth, or perhaps a fourth, of the ordinary contents of one of the late annual volumes of the laws of Pennsylvania.

This, and the other four codes, together, constitute a sort of brief elementary catechism of the French law. It has neither superseded the former learning, nor prevented the subsequent multiplication of law books, cart loads of which have since been published in France, embracing commentaries without number on the contents of each of the codes, besides text books and institutional treatises. With the aid of the Court of Cassation, the codes have in part served the purpose of introducing something like a standard of authority,

where none had existed. This was, as has been stated, the main, if not only purpose of the codification of the laws.

An exaggerated impression prevails as to the extent of the operation of the so-called "Napoleon Code," beyond the limits of the French territory. This code, of course, had not, in itself, the authority of law out of the dominions of France. Even within the limits of her short-lived conquests, it could not, without an express act of state, acquire the force of law. In Prussia, where it was temporarily adopted, under compulsion, after 1807, the old Prussian code was substituted for it in 1814. In other countries, whose governments prepared civil codes for themselves, after the promulgation of the French code, its method and arrangement were ordinarily followed. In its preparation, Cambacères, and the compilers who succeeded and co-operated with him under the Consulate, had, in all cases, retained, as far as possible, the ancient jurisprudence. The common bases of the present, as well as of the former, civil jurisprudence of Continental Europe, are ordinarily found in texts of the Roman Civil Law, or in the glosses of Doctors and Commentators, whose eminence had been recognized in both France and Germany. There is consequently a great apparent similarity in many of the doctrinal provisions of all these modern codes. But those willing to take the trouble of looking into Saint Joseph's concordance, may discover there that the temporary predominance of French political influence, at the time when the greater number of these codes was prepared, did not prevent the permanence of such former distinctive local usages as differed from those of France. A prevalent impression that France, under Napoleon, arbitrarily forced her code upon other nations, which, after her armies were withdrawn, retained it, of their own free will, as a substitute for their former local jurisprudence, is as fallacious as it ought to have been regarded as incredible.

THE CONTRACT OF HIRING.<sup>1</sup>

The opinions of the majority of the judges, and the judgment of the House of Lords, in *Emmens vs. Elderton*, (4 H. L. C. 624), confirming the judgment of the Court of Exchequer Chamber in *Elderton vs. Emmens*, (6 C. B. 160), notwithstanding the cases of *Aspdin vs. Austin*, (5 Q. B. 671) and *Dunn vs. Sayles*, (Id. 685), may be considered as having finally settled, that an agreement between A and B, that A will serve B for a term, and in consideration thereof B will pay a salary for such service, will, in the absence of any stipulation clearly indicating a contrary intention, raise an implied contract on the part of B that he will allow A to continue in the service until the end of the term, in order that the stipulated reward may be earned, and not a mere agreement to pay the salary at the end of the term. B is not bound to find actual work or employment for A, but he is bound to allow the relation of master and servant, or employer and employed, to continue during the term, subject, of course, to his right to dismiss A for misconduct. And the distinction between an agreement to employ or to engage the services of a person in the sense before mentioned, for a given term, and then to pay for such services at the end of the term, and an agreement simply to pay a given sum for services at the end of a certain term, is most important in its consequences. In the former case, the person employed has an immediate remedy, the moment he is dismissed without lawful cause, for a breach of the contract to employ, and will recover compensation in damages for such breach, which may be less than the stipulated wages payable at the end of the term, if it happens that he has the opportunity of employing his time beneficially in another way, and the employer is not then bound to pay the whole sum agreed upon. But if the agreement be that the person employed is to be paid a certain sum for his services at a certain time, provided he serves or is ready to serve, there being no contract to employ during the term, he can only maintain an action,

<sup>1</sup> From the London Jurist, of May 26th, 1855.

after that time has arrived, for non-payment, and then is entitled to recover the full amount, though his loss may be much less. And convenience is decidedly in favor of construing such agreements to be contracts to employ, as well as for the payment of wages. The question in the construction of these, as in all other contracts, is, what was the intention of the contracting parties; but the decision in *Emmens vs. Elderton*, shows that the strong leaning of the judges is, on grounds of policy and convenience, to hold all contracts for service on the one part, and for the payment of wages on the other, for a specified time, to be contracts on the part of the employer to maintain the relation of employer and employed during the term, (though he is not bound to supply work), and not merely to pay the wages, unless there be some stipulation in the contract, or circumstance connected therewith, clearly and distinctly showing a contrary intention on the part of the contracting parties. *Elderton vs. Emmens* was an action by an attorney against a company on an agreement between them, which, stripped of the difficulties which arose from the form of the pleadings, was, in substance, "that from a certain day the plaintiff, as attorney of the company, should receive a salary of 100*l.* a year, in lieu of rendering an annual bill for general business transacted by him for the company, and should, for such salary, advise and act for the company on all occasions and in all matters connected with the company, (the prosecuting, &c. of suits, and some other matters, for which he was to be paid the regular charges, excepted); and that, in consideration that the plaintiff would advise and act for the company in the manner and on the terms aforesaid, the company promised to pay him the salary of 100*l.* a year;" and the plaintiff alleged, as a breach of this agreement, that before the expiration of one year the company wrongfully dismissed him from their employment, and refused to employ him as such attorney of the company, and to pay him the said salary. The Court of Exchequer Chamber, and afterwards the House of Lords, held, that the "refusal to employ," as here alleged, in the breach, must be taken to mean, not a refusal to find actual work for the plaintiff, but, after verdict at least, in the sense which would support the declaration,



viz. a refusal to allow the plaintiff to continue in their service as their attorney—a refusal to continue the relation of employer and employed; and that the agreement showed a contract by the company, not merely to pay the plaintiff his salary at the end of the year, but to continue him in their service as their attorney for one year at least, though they were not bound to find work for him; and that therefore he was entitled to sue the company immediately on his dismissal, for the damages he thereby sustained, and was not bound to wait until the end of the year, and then sue for his year's salary;—and the majority of the judges commented strongly on the great inconvenience that would arise from a contrary construction of the contract; for if the only remedy was by action for the salary, the party employed could enter into no inconsistent employment, but must remain idle during the term; for if he acted otherwise he could recover nothing, because he would not have continued ready to serve until the salary became due. Indeed, it is still an open question whether a person who has engaged to serve for a certain time, at certain wages, and who is wrongfully turned away by his master before that time has expired, is at liberty to elect to treat the dismissal as no dismissal at all, and to demand at the expiration of the term for which he was hired, the whole of his stipulated wages, on the ground that his readiness to serve is equivalent in law to actual service. Mr. Smith, in his notes to *Cutter vs. Powell*, (2 Smith's L. C. 19, 20), states the result of the authorities to be, that a clerk, agent, or servant has his election of three remedies:—First, he may bring a special action for his master's breach of contract in dismissing him, and this remedy he may pursue immediately. (*Pagani vs. Gandolphi*, 2 Car. & P. 370). Secondly, he may treat the contract as rescinded, and may *immediately* sue on a quantum meruit for the work actually performed; (*Planché vs. Colburn*, 8 Bing. 14); but in that case, as he sues on an implied contract, arising out of actual services, he can only recover for the time he has *actually* served. (And see *Fewings vs. Tisdal*, 1 Exch. 295; 11 Jur. 977, *accordante*). Thirdly, he may wait until the termination of the period for which he was hired, and may then, *perhaps*, sue for his whole wages in *indebitatus assumpsit*,

relying on the doctrine of constructive service. (*Gandell vs. Pontigny*, 4 Camp. 375; *Collins vs. Price*, 5 Bing. 132; vide tamen the observations of the judges in *Smittth vs. Hayward*, 7 Ad. & El. 544). As observed by Crompton, J., (4 H. L. C. 646), "It is clear, since the case of *Fewings vs. Tisdal*, that this last remedy cannot be maintained in the shape of *indebitatus assumpsit*, for the simple reason that the allegation of the defendant being indebted for work done is untrue. But the question is still left undecided, how far a special action of debt, averring a contract to pay, a continuing readiness to serve, and a dismissal from service on the part of the master, might not be maintained." And in p. 644 the learned judge, commenting on the inconveniences of allowing such an action, says, "It would be much to be lamented if a servant or agent who was dismissed should be able to say, 'I could easily get another situation as good, or better, but I will not do so, and instead of claiming the real damage I have sustained by the inconvenience and temporary loss of situation, I will bring an action for every instalment of salary, till the contemplated period has elapsed.'" And Parke, B., in the judgment in the Exchequer Chamber, (6 C. B. 187), said, "If it be held that such a contract as this is for service and pay respectively, and that although the employer has determined the relation by an illegal dismissal, the employed may entitle himself to the wages for the whole time, by being ready to serve, a doctrine would be sanctioned that would be of pernicious consequence, as in the case of a business being discontinued, or a dismissal for misconduct without legal proof."—(And see the observations of Erle, J., in *Beckham vs. Drake*, 2 H. L. C. 606).

There are two cases (*Aspdin vs. Austin*, 5 Q. B. 671, and *Dunn vs. Sayles*, Id. 685) cited in *Emmens vs. Elderton* which were questioned<sup>1</sup>, but not distinctly overruled. It is, however, difficult to reconcile them with the principle of that decision. Parke, B., indeed, in delivering the judgment of the Court of Error, (6 C. B. 187), and in his opinion before the House of Lords, (4 H. L. C.

<sup>1</sup> See the opinions of Erle and Crompton, JJ.

669, 670), held that *Aspdin vs. Austin* and *Dunn vs. Sayles*, were clearly distinguishable from the case then before the Court: the former on the ground, that if the Court had there held that the defendant had contracted to continue to employ the plaintiff for the term of three years, the defendant would have been obliged, at however great a loss, to continue his business for that time; and the latter upon a similar ground, and also that in the indenture sued upon in that case the words, "it is agreed," which would make the stipulation the agreement of both parties, were wanting. It is at least questionable whether the distinctions taken by the learned baron are satisfactory. In *Aspdin vs. Austin*, by an agreement between the plaintiff and the defendant, the plaintiff agreed to manufacture for the defendant cement of a certain quality; and the defendant, on condition of the plaintiff performing such engagement, promised to pay him 4*l.* weekly, during the first two years following the date of the agreement, and 5*l.* weekly during the third year, and also to take him into partnership as a manufacturer of cement at the end of the term; and the breach assigned was, that the defendant refused to permit the plaintiff to continue in the service of the defendant during the three years. The Court held that the agreement did not raise an implied promise that the defendant would continue the plaintiff in his service during the three years, or any part thereof; though the defendant was bound by the express words to pay the plaintiff the stipulated wages during that period, if the plaintiff served, or was ready to serve, according to his contract. And Lord Denman, in delivering the judgment of the Court, said, "The breach here assigned by the plaintiff assumes that the defendant, at however great loss to himself, was bound to continue his business for three years; but the defendant has not covenanted to do so; he has covenanted only to pay weekly sums for three years to the plaintiff, on condition of his performing what on his part he has made a condition precedent; and the plaintiff will be entitled to recover those sums, whether he performs that or not, so long as he is ready, and willing, and offers to perform it, and is prevented only by the defendant from doing it. This, then, is the safe rule for determining the rights of these parties between

each other, and no injustice follows to the plaintiff. If he should assign a breach in the non-payment of the weekly sums, it would be no answer for the defendant to say that he had discontinued the business and dismissed the plaintiff; the reply would be, that he might indeed, if he pleased, do both, but that he was still bound to make the payment which he had expressly covenanted to make." It is submitted, that it is scarcely correct to say that the breach in this case assumed that by the agreement the defendant *bound* or *obliged* himself to carry on his business for three years; for if the defendant at any time abandoned his business, he would not be liable to be sued by the plaintiff in terms for such abandonment; the only effect of such a course would be to render him liable to an action by the plaintiff for refusing to continue him in the service, and the measure of damages which the plaintiff would recover would be the loss which he sustained by his dismissal. It is true, that if the defendant ceased to carry on the business, he could not perform his contract to employ the plaintiff in that business; but, as observed by Lord Denman, (5 Q. B. 683), "it would be an extension of the principle of *Sampson vs. Easterby*, (6 Bing. 644), *Saltoun vs. Houston*, (1 Bing. 433), and other cases cited in the argument, to hold, that where parties have expressly covenanted to perform certain acts, they must be held to have impliedly covenanted for every act convenient or even necessary for the perfect performance of their express covenants." And the covenant by the defendant to carry on the business would seem to be in its nature more extensive than a mere covenant to employ the plaintiff in the business, though as between the plaintiff and the defendant the damages arising from a breach of either covenant would be the same. But even assuming that if the Court had construed the agreement as amounting to a covenant to employ, such a construction must necessarily have raised an implied contract to continue the business, it is difficult to see how that could afford any ground for presuming an *intention* on the part of the defendant to covenant only for the payment of wages, and not to employ; for if the defendant must be taken to have known that the effect of covenanting to employ in the particular business for three years would be to raise an

implied contract to carry on the business, he must be presumed to be also cognizant of the consequences of a breach of his covenants. Now, as between the contracting parties in an agreement for the plaintiff to serve and the defendant to employ and pay wages, whether the plaintiff sued for a breach of the contract to employ, or on the implied covenant to carry on the business, the damage sustained by the plaintiff would be precisely the same, the only loss sustained by the plaintiff by the abandonment of the business being the loss of his employment. As, therefore, in such an agreement, the injury to the defendant, in case of a breach of the supposed implied covenant to carry on the business, would not exceed the injury which he would sustain from the breach of the covenant to employ, there does not appear to be any sufficient reason for saying that the circumstance that an implied covenant to carry on the business arises, negatives an intention to enter into a contract to continue the plaintiff in the defendant's service, any more than the implication of a contract simply to employ would do. For a breach of either of these covenants, all that the plaintiff could obtain would be damages for his dismissal; and whether that dismissal was caused by the defendant giving up his business, or by any other cause, the damages would be the same; and these damages, in the great majority of cases at least, must be less than the salary, which, according to the doctrine laid down in *Aspdin vs. Austin*, the plaintiff might sue for from time to time until the end of the term. The inconvenience and hardship to the master is increased instead of diminished by compelling him, in the event of his giving up his business, to pay his workmen the full amount of salary for the period of their engagements, instead of the smaller amount, which in most cases would compensate them for the loss sustained by their dismissal. The inconvenience to the public, and to the servant himself, arising out of such a doctrine has been already pointed out in the passages cited from the judgment of the Exchequer Chamber in *Elderton vs. Emmens*, and the observations of Erle and Crompton, JJ., in the House of Lords. *Dunn vs. Sayles* was decided upon precisely the same ground as *Aspdin vs. Austin*, and for the same reasons as those above urged it is submitted that it

must be considered as substantially overruled by and not distinguishable from, *Emmens vs. Elderton*. With respect to the other ground on which this case was distinguished by Parke, B., viz: the omission of the words "it is agreed," it must be remarked, that in *Emmens vs. Elderton* those words were no doubt most important, for the agreement was simply that the plaintiff should receive and accept a salary of 100*l.* a year; and without the words, "it is agreed between the plaintiff and the defendant that" &c., there would have been no covenant by the defendant even *to pay the salary*, from which alone the covenant to continue the plaintiff in the service, so as to enable him to earn the salary, could be implied; but in *Dunn vs. Sayles* there was an *express* covenant by the defendant to pay the plaintiff wages, and it is from the covenant to pay wages for services, that, according to *Emmens vs. Elderton*, the implied covenant by the employer to continue the employed in the service arises. Parke, B., in his opinion in the House of Lords, (4 H. L. C. 667), himself says, "I think that there is clearly implied, on the part of the person who contracts to pay a salary for services for a term, a contract to permit those services to be performed, in order that the stipulated reward may be earned, besides an agreement to pay the salary at the end of the term." In *Sykes vs. Dixon*, 9 Ad. & El. 693, there being only an agreement by A to serve C for twelve months, without any contract by B to employ A, the Court held the agreement void for want mutuality; but in that case there was *no contract by B to pay wages* for the service, from which a covenant to employ could be implied. The recent case of *Reg. vs. Welch*, 22 L. J., M. C., 145, decides that where, in a contract to serve for a term, the wages to be paid to the servant for such service are not a fixed sum, but are to be *measured by the amount of work done*, the fact that the wages are so made dependent on the work done raises an implied obligation on the part of the employer to find a reasonable quantity of work for the servant, for otherwise the employer would be under no obligation to pay the servant any wages. And see *Pilkington vs. Scott*, 15 M. & W. 657.

*In the District Court of the U. States for the District of Ohio.—  
Special Term of January, 1855.*

**M. E. LUCAS ET AL. vs. THE STEAMBOAT THOMAS SWANN, T. SWEENEY  
ET AL., OWNERS.**

1. A libellant, claiming damages on the ground of a collision with another boat, must make it appear that there was no want of ordinary care and skill, in the management of his boat, and that the injury for which he claims compensation, resulted from the sole fault of the other boat. But the faulty management of one boat, will not excuse the want of proper care and skill in the other.
2. A case of damage resulting from inevitable accident, is defined to be, "that which a party charged with an offence, could not possibly prevent by the exercise of ordinary care, caution and skill."
3. There is no ground for the conclusion in this case, that the injury was unavoidable; but on the contrary, it is a case of mixed or mutual fault.
4. But to constitute a proper basis for a decree, apportioning the damages equally to each boat, as in a case of mixed or mutual fault, the evidence must enable the Court to find the specific faults of each, from which the injury resulted.
5. If the Court is satisfied, that both boats were in fault, and yet from the conflict in the evidence, cannot find, with reasonable certainty, the specific faults of each, it constitutes a case of inscrutable fault; and, in such case, in accordance with the law as settled in the United States, a decree for the equal apportionment of the damages as resulting from the injury, may be entered.
6. The present is adjudged to be such a case, and a decree is entered in accordance with the principle stated.

**Messrs. Walker, Kebler and Ford, for libellants.**

**Mr. T. D. Lincoln, for respondents.**

The opinion of the Court was delivered by

LEAVITT, J.—This is a case in Admiralty, brought by the libellants, as owners of the Steamboat "Fanny Fern," to obtain compensation for an injury to that boat, by a collision with the Steamboat "Thomas Swann," of which the respondents are the owners.

This collision occurred a little after 4 o'clock in the morning of 28th February, 1854, on the Ohio river, some ten or twelve miles below Wheeling, in the channel between Little Grave Creek Bar and the Ohio shore, near the head of the bar, and at the distance of something upwards of one hundred yards from that shore. The Fern was a stern wheel boat of about 450 tons burthen; the Swann is a



side wheel boat, of the largest class of Ohio packet boats, and was, at the time of the collision, one of the boats of the Union Line, from Louisville to Wheeling.

The libellants allege, that as the result of the collision, their boat immediately sunk in fourteen feet water: and, they claim damages for the full value of the boat, as being a total loss. They also allege, that the injury to the Fern was caused solely by the fault and misconduct of those having charge of the respondent's boat; and set forth, as the foundation of their claim for indemnity, that the Fern was descending the river, in the proper and usual place of a descending boat, a short distance above the head of the Grave Creek Bar, and that her pilot, noticing the lights of a boat coming up, near the Ohio shore, and having no signal from her, when the boats were within from a quarter to less than a half a mile of each other, he gave two taps of the large bell of the Fern, thereby indicating his wish to take the left hand side of the channel. The ascending boat proved to be the Swann; and the libellants aver, that she made no response to the Fern's bell, and that the Fern continued her course down, in her proper place, when her pilot, seeing the Swann veering across the channel, towards the Virginia side, promptly gave the order for stopping and backing; and that the boat was stopped and backed, and that every precaution was used to avoid a collision; but, that the Swann wrongfully pursuing her course, across the channel, struck the Fern, nearly at right angles, on the starboard side, near the foot of the stairs about fifteen feet from the stern of the boat, cutting her about two-thirds through, and causing her to go down in less than one minute.

The respondents, on the other hand, deny that there was any fault or misconduct on the part of those having charge of their boat; and insist, that the Fern, before entering the channel between the bar and the shore, was not in the proper place of a descending boat, being not more than thirty yards from the Ohio shore, and so near thereto, that in the line of vision from the pilot-house of the Swann, the lights of the Fern were so blended with the lights on shore at that point, that they could not be distinguished; and that from this cause the pilot of the Swann did not know, and had

no reason to suppose; that a boat was coming down, till the bell of the Fern was heard, at which time the boats were not more than 200 or 250 yards apart; and that instantly, on being apprised that a boat was coming down, the pilot of the Swann gave one tap of the large bell, to indicate that he could not take the Ohio side of the channel, and almost simultaneously rang the bells for stopping and backing. The respondents also insist, that when the Fern's bell was heard, the Swann was in the proper place of an ascending boat, of her size, at that stage of water, following the channel, and slightly quartering towards the Virginia shore; and that the Fern, being close to the Ohio shore, and with every facility for passing the Swann on that side, had no right to signal for the Virginia side; and that the Fern improperly attempted to cross the channel, and was nearly at right angles with it, when the boats came together. And they insist also, that having made the attempt to cross, she was wrong in stopping and backing; and that the collision was the result of this improper navigation, and not any faulty conduct on the part of the Swann.

It may be noticed here, as one of the facts about which there is contradiction in the evidence, that the stern of the Swann struck the Fern at an angle of about  $72^{\circ}$  quartering towards her stern; and that she sunk, near the head of the bar, about one hundred yards from the Ohio shore; her stern being in deep water, and very near the line of navigation, usually followed by both ascending and descending boats at that point.

This brief outline presents the nature of the controversy between these parties. Their theories and assumptions, both in the pleadings and by the evidence, are in direct conflict; and it may be added, both cannot be sustained. The libellants claim, that their boat was without fault, and therefore that the respondents are answerable for the whole damage she has suffered from the collision; while the respondents claim, that the injury to the Fern was not occasioned by any fault on their part, but is chargeable solely to her mismanagement.

The evidence affords no ground for any unfavorable presumption against either of the parties, for any failure to comply with the

requirements of the Act of Congress of 1852. Whatever of contradiction there may be in the proofs in other respects, it satisfactorily appears, that each of the boats was provided with the requisite signal lights, and that they were in good order at the time of the collision; and also, that each was manned with the usual and necessary number of men and officers. And it is specially worthy of notice here, that the proof is ample, on both sides, to show that the pilot of each boat, on duty at the time of the collision, was, in all respects, trustworthy, and well qualified for the duties of his station.

With a view to some proper basis for a decree in this case, I have carefully read and reflected on the great mass of evidence presented on the hearing, partly oral, but mostly in the form of depositions. In this effort, I have encountered great difficulties, arising from the discrepant and contradictory character of the evidence, for and against the opposite claims of the parties. It is impossible, by any mental process, or upon any known principle of estimating the preponderance of evidence, to decide with even reasonable certainty, in what direction the scale should incline. With equally favorable opportunities of witnessing the occurrences to which they testify, and with the presumption, that the witnesses on either side are equally intelligent, truthful and credible, it would seem to be an arbitrary exercise of the discretion of a judge, to reject the testimony given by one party and accredit that given by the other.

To show the difficulty, if not the utter impossibility, of sustaining the hypothesis of either of these parties, it is only necessary to state some of the essential features or aspects of the case, in regard to which the evidence is in direct and irreconcilable conflict. And first—it is a conceded fact in the case, that the signal bell of the Fern, the descending boat, was first sounded; but as to the relative position of the boats, when the bell was tapped, and when the pilot of the Swann was apprised that a boat was approaching, the testimony of the parties is essentially variant. The witnesses for the libellants testify that the Fern, at that point, was in the proper place of a down-going boat, some one hundred and thirty yards out from the Ohio shore. and nearly on a line with the inner side of the bar. On the other hand, the respondents' witnesses testify,

that when the bell of the Fern was first tapped, she was so near to the Ohio shore, that her lights were blended with, and could not be distinguished from lights along the shore ; thus rendering it impossible for the pilot of the Swann to know that a boat was coming down, until her bell was heard ; and also, excluding the descending boat from the right of choosing the outer or Virginia side of the channel, and making it altogether wrong in her to cross the channel, for the purpose of getting on that side. And the evidence is not less conflicting, in reference to the position of the Swann, the ascending boat, at the point where she was first seen by the pilot of the Fern. On one side, the proof is, the Swann was coming up the Ohio shore ; on the other, that she was out in the channel, quartering to the Virginia side. And as to the distance between the boats, when the Fern was first seen by the pilot of the other boat, a point of vital importance in the decision of the case, the evidence is very discrepant. The pilot of the Fern swears, the distance was near a half a mile, and other witnesses for the libellants state it, as upwards of a quarter of a mile ; while, for the respondents it is proved, it did not exceed two hundred and fifty yards, and in the opinion of one witness, was not more than one hundred and fifty yards. There is also a flat contradiction between the testimony of the parties, as to the course of the two boats, and their position, at the time they came together. The libellants' witnesses swear, the Fern was running straight down the river, up to the time the pilot tapped her bell, and was then turned slightly across towards the Virginia side ; whereas, the respondents' witnesses say, she was running nearly square across the river, and was struck by the Swann almost at right angles. And there is the same conflict in reference to the position of the latter boat. The witnesses for the libellants prove, that the Swann turned out from the Ohio shore, and was pointed across the channel, towards the Virginia shore when the collision took place. The witnesses on the other side say, her course was not changed, from the time the Fern was seen, and was but slightly inclined towards the Virginia shore. And again—while the witnesses on one side state positively, that the Swann ran into the Fern, those on the other are equally clear, that it was the Fern that struck the Swann.

There are some of the points in reference to which the evidence is conflicting to an extent that makes it difficult to come to a conclusion for or against either of the parties. The libellants, as the result of this unfortunate collision, are the sole sufferers; no injury having been sustained by the other boat; and, as already stated, they claim indemnity for the whole amount of the injury they have sustained. They are entitled to a decree for this, only on making proof, that the injury resulted from the fault of those having charge of the respondents' boat, and that there was no want of ordinary care and skill on the part of the libellants to prevent the collision. On the other hand, it is a well settled principle of maritime law, that the fault of one boat or vessel, will not excuse any want of care, diligence or skill in another. Now, if the Court was at liberty to regard the evidence for the libellants, to the exclusion of that offered by the other party, there could be no hesitation in decreeing indemnity for the full amount of the injury. That evidence proves the respondents' boat to have been in fault, without any blame imputable to the libellants. But, if the evidence of the respondents is received and accredited without regard to that adduced by the libellants, the fault would rest upon the boat of the latter; and, the result would be, a decree dismissing the libel, at the costs of the libellants. But for the reasons stated, I am unable, satisfactorily, to come to either of these conclusions, or enter a decree upon either of the grounds indicated.

Without thinking it necessary, in the view I take of this case, to enter minutely into the examination of the evidence presented on both sides, I am prepared to state, as the conclusion of my mind, that the collision in controversy was not the result of inevitable or unavoidable accident. This is defined to be, "that which a party charged with an offence, could not possibly prevent, by the exercise of ordinary care, caution and maritime skill." 2 Dods., 83; 2 Wm. Rob., 205; Flanders on Mar. Law, 298. It is not a reasonable supposition, that the injury sustained by the libellants' boat, could have been inflicted, without some fault, and as the mere result of unavoidable necessity. There was, at the time of this occurrence, not less than twelve feet water in the channels of the river,

and it was then rising. At the place where the Fern sunk, near the outer edge of the upper part of Grave Creek Bar, there was a depth of fourteen feet. There was deep water the whole width of the channel between the edge of the bar and the Ohio shore, which at that stage of water, was from one hundred to one hundred and twenty yards wide; and even upon the bar itself, there was six feet water. There was then ample verge for these boats to have passed, without coming in contact. And moreover, there is no disagreement in the statement of the witnesses, that the night was calm, and although somewhat cloudy, not so dark as to render navigation difficult or dangerous. With these facts in view, there would seem to be no difficulty, in reaching the conclusion, that there was a censurable want of care, caution, or skill, in the management of these boats; and that the injury cannot be fairly placed to the account of inevitable accident.

It follows from this conclusion, that if this is a case warranting a decree for indemnity, it must be regarded, either as one of mixed or mutual fault; or, of inscrutable fault. If it be a case belonging to the first of these classes, by the well settled principles of the maritime law—differing in this respect from the common law—the decree must be for an equal apportionment of the injury sustained, between the two boats, with such order in respect to the costs, as the court may deem equitable. While I do not affirm, that such a decree might not be justified in this case, there would seem to be an objection to such a disposition of it. As I understand the maritime law, the Court must find, as a basis of such decree, not only that blame is imputable to both parties, but must find specifically, the faulty acts of each, to which the injury is to be charged. As already intimated, it may be well doubted, whether the most searching analysis of the evidence, would result in a satisfactory conclusion as to the precise acts of which were the direct cause of the collision. The contradictory character of the evidence involves the facts of this case in great doubt, and renders it extremely difficult to attain such a result with reasonable certainty. Nearly every fact stated by the witnesses, importing censure in the management of either of the boats, is so far impugned by opposing evidence, as

to create doubt and uncertainty. In this state of the case, the Court would scarcely be justified in assuming a theory, which could only be maintained by an arbitrary repudiation of the evidence on one side, and accrediting that offered by the other. For the reasons which will be stated hereafter, there is no necessity for a resort to this desperate expedient, to attain the ends of justice in this case.

It is true there is one exception to the remarks just made, that nearly every material fact implicating either boat, is contradicted by opposing testimony. It has not escaped the attention of the Court, that the evidence shows conclusively, that the Swann, as the ascending boat, failed to give the first tap of the bell, as required under certain circumstances, by the rules of the Board of Supervising Inspectors, adopted pursuant to the Steamboat Law of 1852. This act of Congress confers on this Board, ample authority to adopt such rules; and they are obligatory in cases to which they fairly apply. And a violation of any of these rules, resulting in disaster, raises a presumption of culpability, which can only be removed by proof that the collision is attributable to some other cause. The rule referred to, requires the pilot of an ascending boat, "so soon as the other boat shall be in sight and hearing, to sound his bell," etc. But if, with ordinary diligence, the descending boat is not seen or heard in time to enable the pilot to comply with the rule, no censure can attach for not doing so. It would seem from the evidence of the respondents, that the Fern, from the fact that she was too near the Ohio shore, and from the impossibility of distinguishing her lights from those on the shore, was not seen and known to be a steamboat, until her bell was heard by the pilot of the Swann. This fact would excuse the pilot for not complying with the rule referred to. In reference to some other requirements contained in these rules, which have been noticed in the argument, I have only to say, that I doubt their application to the then state of the river, and the circumstances in which these boats were placed, immediately preceding the collision. There was not only a wide channel between the Ohio shore and the bar, but in point of fact, there was water enough on the bar itself, for either of the boats to have passed over it. Without further remarks on this point, I have



only to say, in reference to the rules referred to, that they must be construed in subordination to the paramount rule of navigation, that a collision must always be avoided if possible; and an injury inflicted will not be justified, unless inevitable, on the ground that the injured boat had violated a prescribed rule.

But, I do not propose to enter into an elaborate inquiry, whether this is a case of mixed or mutual fault, justifying a decree on that basis. In my judgment, there are, as before intimated, obstacles in the way of entering such a decree, in this case. And as it may be disposed of upon another principle, according, as I think, with strict justice and the doctrines of the maritime law, I prefer to place it on that ground. In its results, so far as the interests of these parties are concerned, the decree which I propose to enter, for an equal apportionment of the loss sustained by the collision, are the same as if based on the finding of mixed fault.

As already intimated, I cannot, upon the evidence before me, with very reliable certainty, adopt the conclusion, that the injury suffered by the libellants, arose from the sole fault of those in charge of the respondents' boat; nor can I find the reverse of this proposition to be satisfactorily established, and thus hold, that the respondents are absolved from all liability for the injury sustained. It is equally clear, for reasons before adverted to, that this injury can not be fairly charged to inevitable accident. It is a fair deduction, from the facts before the Court, that the cause of this collision is to be found in the faulty management of one or both of these boats. And I have no hesitation in concluding, that in the excitement produced by the occasion, the pilots of both were in fault. This is a reasonable implication, from all the circumstances involved in the transaction. And yet, from the conflict in the evidence, it is difficult if not impossible, to determine to what direct and specific acts the collision is to be attributed. And this, as I understand the maritime law, makes it a case of damage or loss, arising from a cause that is inscrutable. It is not, of course, to be inferred from this, that any doubt exists, that the immediate cause of the injury to the Fern, was the collision between the boats; but it implies, that the causes which led to this result are involved in obscurity and doubt.

In this view, it only remains to inquire, what decree shall be made in this case. This is the only occasion on which this point has been before this Court, and I confess, that from my limited experience in the administration of maritime law, I enter upon its consideration with some hesitancy, and with great reason to distrust the conclusions to which I might be led, unaided by the light which others have thrown upon the subject.

It is insisted by the counsel for the respondents, that the maritime law gives no redress for an injury resulting from the collision of boats or vessels, unless the Court can find from the evidence that it was the result of the *sole* fault of one; or that there was *mixed* or mutual fault. This ground supposes that there can be no decree for an apportionment of the loss, if, for any reason, the cause of the injury is inscrutable, or left in such doubt that there can be no satisfactory finding of specific facts.

The English admiralty decisions referred to by counsel would seem to sustain this position. They certainly show, that where the cause of the injury is inscrutable, and the proof does not implicate either of the parties as in fault, there can be no decree for an apportionment of the loss. I do not think they establish it as the law in England, that where there is reason to conclude one or both the parties was in fault, but the evidence leaves it uncertain which, that no decree can be rendered for a contribution by moieties. I do not, however, propose a critical examination of these cases, as I consider the question referred to as satisfactorily settled in this country.

In his commentaries on Bailments, Secs. 609, 610, Judge Story discusses this question, and maintains the right and expediency of dividing the loss, as between colliding vessels, where the fault is inscrutable. His language is: "Another case has been put by a learned commentator on commercial law. It is, where there has been some fault or neglect, but on which side the blame lies is inscrutable, or is left by the evidence in a state of uncertainty. In such a case, many of the maritime states of continental Europe have adopted the rule to apportion the loss between the vessels." The writer referred to by Judge Story is Mr. Bell, whose commentaries on the laws of Scotland have given him a distinguished reputation

as a jurist. And in reference to the doctrine asserted by this author, Judge Story remarks, that "if the question be still open for controversy, there is great cogency in the reasoning of Mr. Bell, in favor of adopting the rule of apportioning the loss between the parties. Many learned jurists have supported the justice and equity of such a rule; and it especially has the strong aid of Pothier, and Valin, and Emerigon." In a note, appended to the section before cited, Judge Story has inserted the argument of Mr. Bell in the maintenance of his views, the force and clearness of which certainly entitle it to the highest consideration.

I am not informed whether the doctrine, thus approvingly referred to by Judge Story, has been distinctly asserted by him in any case calling for its judicial recognition. But another learned American judge, eminent for his profound research in the doctrines of the maritime law, and his able and judicious administration of that law, holds the rule for the apportionment of damages, in case of an injury by collision, where the fault is uncertain or inscrutable, as indisputable, in the United States. In the case of *the Scioto*, reported in Davies' Reports, 359, Judge Ware, the learned Judge of the United States for the District of Maine, says: "This rule in admiralty—a contribution by moieties—seems to prevail in three cases: *first*, where there has been no fault on either side; *second*, where there may have been fault, but it is uncertain on which side it lies; and *third*, where there has been fault on both sides." In the syllabus of this case, the point is stated thus:—"But if it—the collision—happens without fault in either party, or if there was fault, and it cannot be ascertained which vessel was in fault, or if both were in fault, then the damage and loss are divided between them, in equal shares."

I may be permitted to remark, though I have not seen the reported cases, that I am informed that since the decision in the case of *the Scioto*, before referred to, Judge Ware has asserted the same principle in other cases. To what extent other American judges have affirmed it, I have not the means of information. But, having the high sanction of Story and Ware—both known as able exponents of the maritime law—and sustained, too, by the most

distinguished jurists of continental Europe, I have no hesitancy in applying it to the case before the Court.

A late elementary writer on maritime law, in this country, of high reputation for accuracy and learning, affirms, that "without question, the doctrine above stated is the *American* law on this subject." This writer says: "Where the collision is evidently the result of error, neglect, or want of precaution, which error, neglect, or want of precaution is not directly traceable to either party, but is inscrutable, or left by the evidence in a state of uncertainty, there the rule of the maritime law is, that the loss must be apportioned between the parties, in equal moieties." *Flanders on Mar. Law*, 296. This writer admits that a different rule prevails in England, but very justly remarks, "that the rule adopted in England does not necessarily determine the law for us, in the United States. And accordingly, we find that the Courts of Admiralty in this country adhere to the rule of the ancient maritime law." *Ibid*, 298.

Adopting this view of the law, and satisfied that the application of the principle adverted to meets the real equity of the case, I shall decree an equal apportionment of the loss between the parties. As already stated, the contradictory and irreconcilable character of the evidence, leaves the mind in doubt and uncertainty as to some of the important facts in the case; but there is a satisfactory ground for the conclusion that both the colliding boats were in fault, and therefore that each should contribute to the loss. And I may remark here, that in my judgment, the enforcement of the principle here sanctioned, is not only vindicated as in itself just and equitable, but in its application to the navigation of the western waters, as altogether expedient. Heretofore, in cases of collision, the great object of each party has been to prove his adversary exclusively in the wrong, and thereby avoid all pecuniary liability. And, it is almost proverbially true, that in collision cases, each party has but little difficulty in sustaining, by the proofs, any state of facts which may be insisted on. In most cases, the witnesses on either side, from a misapprehension of the facts, or a dishonest purpose of representing them falsely, involve the transaction in such doubt and uncertainty as to render it impossible to reach a satisfactory con-

clusion. If, under such circumstances, a reasonable ground is furnished for the conclusion that there is fault on both sides, and that each party should share in the loss sustained, there would be greater caution and vigilance in navigation, and less effort and less temptation, by corrupt or unfair means, to misrepresent or distort facts.

It appears satisfactorily, that the injury resulting from the collision fell almost exclusively on the Fern. The injury to the Swann was so slight that the respondents have set up no claim to remuneration. The result, therefore, of the decree will be, that one-half of the actual loss or injury sustained by the Fern, must be paid by the respondents. The value of the Fern is variously estimated by the witnesses who have testified on that subject, at sums ranging from \$12,000 to \$20,000. For the purposes of this decree, the Court fix her value at \$15,500. There is proof in the case, that the Fern has been raised, but no evidence was offered of her value, including her engine and machinery, after the collision. This value, whatever it may be, will be deducted from the sum of \$15,500, and the respondents are decreed to pay the libellants one-half of the balance. It will be necessary to appoint a Commissioner to inquire into and report the value of the Fern, after the injury. This will be provided for in the decree to be entered. In reference to the costs, under the circumstances of the case, no discrimination will be made between the parties, and they will therefore be paid equally.

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*In the Supreme Court of Alabama.*

MOBILE MARINE DOCK AND FIRE INSURANCE COMPANY vs.  
M'MILLAN AND SON.

1. A marine policy is to be construed according to the general and known course of trade with regard to vessels of a similar character, with a similar cargo, and on a similar voyage, to that insured.
2. A policy of insurance was made on a cargo of cotton, shipped on a sea-going steamer, the risk to commence at the port of Mobile, and to continue and endure until the goods were safely landed at the port of New Orleans. The instrument was in the usual form, and employed only the usual terms, of a marine policy. The

vessel arrived in due time at her accustomed berth on the southern shore of Lake Pontchartrain, which is well known to be the port of New Orleans for vessels of such character, and from whence goods are conveyed by railway to the city itself. After she had discharged safely a portion of her cargo, an accidental fire destroyed, on the wharf, so much as she had landed. *Held*, that the risk under the policy terminated on a delivery at the wharf, and did not continue until delivery to the consignee, or his agent; that it was not necessary that the goods should be landed at the place where it was usual for the consignee to receive and take charge of them; and that the insurers were, therefore, not liable.

3. In this case, the policy was a valued one upon 198 bales of cotton, valued at \$50 a bale. Of these, 134 bales had been landed, and been destroyed by the fire. *Held*, that the contract was a severable one; that the insurers would have been liable, if at all, only for so many bales as were actually destroyed; and that the insured could not recover as for a total loss.

#### Error to the City Court of Mobile.

McMillan & Son shipped by the steam-packet *Helen*, 198 bales of cotton, from the port of Mobile to the city of New Orleans, and effected a policy of insurance thereon, in the office of the appellants, which is in the usual form of marine policies; the risk to commence at the port of Mobile, and to continue and endure until the goods were safely landed at the port of New Orleans. The *Helen* arrived in due time at her accustomed place of discharging her cargo on the southern shore of Lake Pontchartrain, and had unloaded 134 of the bales, when the steamer *Georgia* came up and anchored. A fire immediately broke out upon the *Georgia*, which communicated to the cotton which the *Helen* had put out on the wharf, and consumed it. The remaining 64 bales were delivered to the consignee in the city, and accepted without objection. It appeared that the boat had a standing arrangement with the Jefferson and Carrollton Railroad, to convey the cotton from the lake port where it was landed to the city of New Orleans, the boat collecting the entire freight and paying to the railroad the proportion due to it. This action was brought by McMILLAN & SON, against the Insurance Company to recover on the policy for the 134 bales which were burned. The other facts necessary to a more complete understanding of the case will appear in the opinion. The plaintiffs below had judgment for \$50 per bale—\$6,700—to reverse which the case was taken to the Supreme Court.

The case was ably argued by

*Mr. P. Hamilton*, for the appellant, and

*Mr. R. H. Smith*, for the appellee.

The opinion of the Court was delivered by

CHILTON, C. J.—It is a rule of construction settled by numerous authorities, that every usage of trade, which is so well settled, or so generally known that all persons engaged in that trade may fairly be considered as contracting with reference to it, is regarded as forming part of every policy designed to protect risks in that trade, unless by the express terms of the policy, or by necessary implication, such inference is repelled. 1 Duer on Ins. 195, §§ 42, 43; *ib.* 267, §§ 60, 61, 62; Arnould on Ins. (1850 ed.) 65; Hughes on Ins. 109, 110; 1 Phillips on Ins. (ed 1853,) 79 et seq.

The contract declared on is essentially a marine policy, providing for protection of goods shipped on board the *Helen*, upon a *sea voyage*, and against *sea risks*, and there is nothing contained in this policy which, by a fair construction, can be made to extend to and cover *terrene risks* after the cotton shall have been *safely landed* at the usual place of discharging the cargo by the vessel; unless, indeed, under the facts, we are required to hold that the port of New Orleans means the port at the city, and not the port which is known by the same name on Lake Pontchartrain, where the cargo was put on shore.

It is conceded that the policy is to be construed liberally for the benefit of the assured and with a due regard to its design and object as an undertaking to indemnify. *Kent vs. Bird*, Cowp. Rep. 585; *Godsall et al. vs. Boldero*, 9 East, 72–82; Hughes on Ins. 145 (marg. page); per Lord Ellenborough in *Bainbridge vs. Neilson*, 10 East, 344; *Pelly vs. Royal Exchange Assurance*, 1 Burrows, 349; *Wolff vs. Horncastle*, 1 Bos. & Pul. 322; *Kaines vs. Knightly*, Skin. 55; 2 Saund. Rep. 200, (a) note 1. “It is certain,” said Lee, C. J., in *Pelly vs. Royal Ex. Ass.*, *supra*, “that in construing policies the *strictum jus* or *apex juris* is not to be laid hold on; but they are to be construed largely for the benefit of trade and *for the insured*.” Nevertheless, as was said by Lord Ellenborough, C. J., in *Robertson vs. French*, “The same rules of construction which



apply to all other instruments apply equally to this instrument of a policy of insurance, namely, that it is to be construed according to its sense and meaning, as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary, and popular sense, unless they have generally in respect of the subject matter, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words ; or unless the contract evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense. The only difference between policies of assurance and other instruments in this respect, is, that the greater part of the printed language of them being invariable and uniform, has acquired from use and practice, a known and definite meaning, and that the words superadded in writing, (subject indeed always to be governed in point of construction by the language and terms with which they are accompanied,) are entitled nevertheless, if there should be any reasonable doubt upon the sense and meaning of the whole, to have a greater effect attributed to them than to the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, and the printed words are a general *formula* adapted equally to their case and that of all other contracting parties upon similar occasions and subjects." 4 East, 135, 136.

The language in the policy before us, as we have said, provides against loss from certain perils while the goods are in process of *marine transportation*. They are shipped on board the Helen, upon a *voyage*, from the port of Mobile to the port of New Orleans, enumerating the perils and adventures usually inserted in *marine* policies, and it fixes the *termini* of the risk, the point *a quo* being the port of Mobile, "and to continue and endure until the said goods shall be safely landed at the port of New Orleans."

We must not confound the obligation of the insurer with that of the carrier. The boat, by the bill of lading was obliged to have the cotton taken to the city, and the consignees were not bound to re-

ceive it at the lake depot of the railroad, but it by no means follows, that the insurance extends to this terrene transportation. According to its terms, it closes with the terminus of the voyage of the *Helen*, after the goods shall have been safely landed. There is no proof whatever, to show that such policies were regarded by merchants, insurers or shippers, as usually embracing such risks, and we have found no case which authorizes the extension of a marine policy to cover land transportation. Whether, indeed, it would be competent to extend the language employed in this policy by proof of usage or custom so as to make it cover losses after the goods had been safely landed in the usual way, and at the usual place of discharging the cargo by the *Helen*, is a question of some difficulty, and one which we are not now called upon to decide. So far as the proof goes upon this point, it is adverse to the construction contended for by the assured, two cases being shown where policies had been effected to *New Orleans* instead of to the *port of New Orleans*, in which it was considered by the parties that the risk continued to the city; but in both of these a greater premium was paid than was required to insure to the port of New Orleans, as understood to be the point of discharging the cargo at the south shore of Lake Pontchartrain. But we lay no stress on these cases as establishing a custom. We rest our decision upon the *terms of the policy itself*, considered, of course with reference to what is usually done by such a vessel with such a cargo, in such a voyage, all which must be considered as forming a part of the policy, as much so as if inserted in it. 1 Burr., 350; 2 Saund., 200 (a.) n. 1. Both the assurer and insured are chargeable with a knowledge of the course of this trade, and are presumed to contract with reference to it. *Noble vs. Kennoway*, Doug., 510; *Salvador vs. Hopkins*, 3 Burr. 1712; *Vallance vs. Dewae*, 1 Camp., 505, n.; ib. 508; 3 ib. 200; 1 Taunt., 463; Selw. N. P. 963; 1 Arnould Ins. 43; ib. 66; Hughes Ins. 146, bottom p. The parties then knew that the *Helen* landed her goods at the port of New Orleans, *on the wharf at Lake Pontchartrain*. They knew this vessel did not go to the city of New Orleans, they insert no words in the policy making the liability of the insurer co-extensive with that of the carrier, nor extending it beyond a "safe landing of

the goods " upon the *termination of the voyage*; no custom or usage is shown to extend the voyage, and of consequence, the risk, to the city of New Orleans, and such being the case, we should do violence to the terms of their contract to continue the risk after the voyage had terminated, and the goods were safely on land at the usual place of discharging them.

The risk is at an end whenever the goods can be considered as landed according to the usual course of business, at the accustomed port of destination, although they may never have been delivered into the hands of the consignees. 1 Arnould on Ins., 437; *Gatliffe vs. Bourne*, 4 Bing., N. C. 314; S. C. in House Lords 7 M. and Gr., 850.

It follows from what we have said, that the court erred in the charges which held the insurer liable until the goods were delivered to the consignee or some one for him. So also in the qualification given to the charge asked, which assumed that the goods must be landed at the place where it is usual for the consignee to receive and take charge of them. The delivery to the consignee, as well as the usual place where he was accustomed to receive and take charge of the goods, could not affect the liability of the insurer, so as to extend the risk beyond the terminus of the voyage. These were questions between the consignee, or owner and the carrier. It was certainly competent for the parties to contract for covering losses which should come to the goods upon their marine passage and until safely landed, leaving their overland passage unprotected by the policy. This, we have held, was the effect of the policy before us, and as the terminus of the marine risk was not the terminus of transportation contracted for by the carrier, it was erroneous to make the liability of the insurer depend either upon the delivery of the goods to the consignee, or at a place where he usually received and took charge of them.

The next question which arises is, did the errors which we have noticed, injuriously affect the rights of the insurer. If they did not, we cannot reverse; for it is well settled that an error which can do no injury works no reversal. *Porter vs. Nash*, 1 Ala. Rep. 452; *Caruthers vs. Mardis, adm'r*, 3 ib. 599; 9 Por. Rep. 403;

*Denley vs. Camp*, 23 Ala. Rep., 659; *Fane vs. Cathcart*, 8 Alab. 726; *Smith vs. Houston*, id. 737.

If the contract was entire; if, in other words, the engagement to safely land the 198 bales of cotton was not complied with until the whole were landed in safety, then the errors of the court worked no injury, since it is conceded that only 134 of the bales were landed and they were consumed by fire before the others were put on shore.

Waiving the fact that the first count in the complaint expressly states that the cotton was valued at \$50 per bale, and the statement contained in the bill of exceptions that "the plaintiff proved the contract of insurance with the defendant upon 198 bales of cotton, valued at \$50 per bale," &c., we think the contract must be regarded so far severable as to exonerate the underwriters for that portion which was safely landed. The contract is one of indemnity. The valuation is settled by the agreement of the parties, so that in case of loss, proof of value may be dispensed with; but where the articles are separate and each parcel is unaffected in value, whether considered separately or aggregately, there is no good reason why the failure safely to land one bale should make the underwriters liable to pay the aggregate value of the 198 bales. It could not be maintained that the underwriters would have been exempt from liability had the appellees, after effecting the policy upon 198 bales, only shipped 197, and these had been destroyed by some of the perils embraced by the policy. They could not be allowed to say, "true, the loss has occurred by reason of a risk insured against, but the assured failed to ship the number of bales specified in the policy, and the contract was entire—we must be liable for the 198 bales or for nothing." The rule is that if less than the number specified in the policy are shipped, the assured has the right to demand a corresponding return of the premium; 2 Arnould on In. 12, 275. We think the cases of *Gracie vs. The Marine Ins. Co.*, 8 Cranch, 75, and the same vs. *The Maryland Ins. Co.* ib. 84, fully sustain the view we have above taken. In the latter case, a part only of the cargo was landed, and the policy provided for the continuation of the risk, "until the said goods shall be safely landed,"

&c. If no part of the goods could have been "safely landed" until the whole were landed, then in that case, there would have been a total loss, and the assured would have been unaffected by the warranty against particular average loss. But the court held otherwise, and discharged the underwriters upon the ground that the loss was partial, a portion of the goods having been safely landed within the meaning of the policy, and hence the assured was affected by the warranty against particular average.

We have seen that the consideration for the insurance, the premium, is susceptible of apportionment. It is  $\frac{3}{8}$  on the value of the cotton shipped, and that each bale may be severed from the others without affecting its value. The true rule then, in such cases, is to consider the contract as entire with respect to each measure and not in respect of the whole lot. Story on Con. §§ 24, p. 18; ib. 21, *et seq.*

The case of *Gardner et al. vs. Smith*, 1 Johns. Cas. 141, is relied upon by the counsel for the appellees. In that, by the terms of the policy, the risk was to continue until twenty-four hours after the goods named in the margin were landed; the risk providing against seizure of the goods as illicit trade. A portion of the goods had been landed more than twenty-four hours, when the whole were seized as illicit. Justice Lansing said, "the insurance being entire, we are of opinion that the risk continued on the entire goods, until twenty-four hours after *all* of them were landed."

Perhaps a distinction may be taken between the case cited and the one before us, but if it be parallel, we are not disposed to follow it. Nor are we alone in doubting its authority. An able writer upon the law of insurance does not hesitate to doubt it, and to state it as the better doctrine "that the risk terminates on each parcel at the end of twenty-four hours after it is landed." See 1 Phillips on Ins. ed. 1853, p. 539 § 972.

After the best consideration we have been able to bestow upon the case, we are satisfied the court below mistook the law in the charges which conflict with the views above expressed. The judgment is therefore reversed, and the cause remanded.

*Waukesha Circuit Court, Wisconsin—May, 1855.*THE MILWAUKIE AND MISSISSIPPI R. R. CO. vs. THE SUPERVISORS OF  
WAUKESHA COUNTY, ET AL.

1. It is provided by the Constitution of Wisconsin, Art 8, § 1, that "the rate of taxation *shall be uniform*, and taxes shall be levied upon such property as the Legislature shall direct." In 1854, the Legislature of that State passed an act requiring "all Railroad Companies which were or should be organized within the State," to pay to the State Treasurer annually, for the use of the State, "a sum equal to one per cent. of the gross earnings of their respective roads." The Act further declared, that "this amount of tax shall take the place and be in full of all of the taxes of every name and kind upon said road, and the property belonging to the said companies or the stock held by individuals therein; and it shall not be lawful to assess thereupon any other or further assessment or tax for any purpose whatever."

*Held*, that this act was not unconstitutional, though the annual assessment on Railroad Companies, was to be on income, instead of on property, as in other cases; and though the companies were exempted thereby from town, county, and district taxes.

## Demurrer to Injunction Bill.

HUBBELL, CH. J.—The Legislature of this state, on the first of April, 1854, passed an Act requiring "all Railroad Companies which were or should be organized within the state," to pay to the State Treasurer annually, for the use of the state, "a sum equal to one per centum of the gross earnings of their respective roads." The Act further declares that this amount of tax shall take the place and be in full of all of the taxes of every name and kind upon said road, and the property belonging to the said Companies or the stock held by individuals therein; *and it shall not be lawful to assess thereupon any other or further assessment or tax for any purpose whatever.*"

Deeming this solemn Act of the Legislature unauthorized, the Assessors of the town of Eagle and of other towns in the counties of Waukesha and Milwaukie, returned the property of the complainants for the year 1854, and taxes were levied thereupon as if no such law had existed.

The complainants filed their bill, and obtained a writ of injunction

out of this Court, temporarily restraining the collection of those taxes. To this bill the defendants interposed a demurrer.

The question now to be determined is, whether this law is valid or void, under the Constitution of the state. There is, I believe, but one section of the Constitution applicable to the subject.—Section 1, of Article 8, is as follows:—“*The rule of taxation shall be uniform, and taxes shall be levied upon such property as the Legislature shall prescribe.*”

The defendants contend that under the law in question, ‘the rule of taxation’ is *not* “uniform;” 1st, Because it establishes a rule of taxation for property belonging to the Companies mentioned, different from the general rule applicable to the taxation of other property—it being a tax upon *income*, instead of a ratable tax upon *value*; 2d, Because it levies a *State tax*, and exempts from town, county and district taxes; 3d, Because it establishes a new mode of levying taxes, differing from the general rule. A point was also made, that the Attorney General ought to be a party defendant, but as that is a question of practice, and as I do not think the decree in this case will bar or affect the right of the State to collect the one per centum required to be paid to the Treasurer by the Act, I shall not discuss the question.

I am compelled to dissent from all the positions taken by the defendants. Their error arises in part, I apprehend, from looking at the first clause of the section quoted, without due regard to the remainder. The last clause qualifies and controls the first:

“Taxes shall be levied upon such property as the Legislature shall prescribe.” No property can be lawfully taxed until the Legislature authorizes and requires it to be done—and, of course, no property can be taxed when the Legislature prohibits its being done. The legislature is vested with the absolute power of declaring what property throughout the State shall be, and what shall not be, subject to taxation.

This power has been variously exercised from the first organization of the State Government; and almost every Legislature has restricted or extended the quantity or character of property coming within the rule. Large amounts, of both real and personal pro-



erty, have been *wholly exempted* from taxation. For instance, all property of the United States, and of the State; all property of the several counties, cities, villages, towns and school districts, used or intended for corporate purposes—personal property exempt by law from execution, not exceeding in value \$200; the personal property of all incorporated literary, benevolent, charitable and scientific institutions, and all such real estate belonging to them, as shall be actually occupied for the purposes of their incorporation; all houses of public worship and the lots on which they are situated, and the pews, slips and furniture therein; every parsonage and all burial grounds, tombs and rights of burial; all public libraries and the real or personal property belonging to, or connected with the same; also, the property of cemetery associations; of the state and county medical societies; and probably, that of many other persons and corporate bodies, which I have not noticed. All this has been wholly exempted.

This exercise of power, on the part of the Legislature, has not, to my knowledge, been questioned, and there is no doubt that to this long list, the Legislature might have added, the property of all Railroad and Plank Road Companies. And, if it might exempt wholly, why not in part? The major power includes the minor. A general power to pardon, includes the right to annex conditions and to grant reprieves.

I see no reason why, upon this principle, the law in question, which operates as a partial exemption from general taxation, may not be valid. Regarding the annual payment to the state as a tax, as the defendants claimed, why might not the Legislature grant exemption in all other respects? The law certainly is not void, because it is not worse, and does not confer greater privileges upon these companies—to wit, total exemption.

But I regard the payment to the State, not as a tax, but as a *bonus* or *compensation* for the exemption granted. The whole substance and effect of the law is to relieve the Companies absolutely from all ordinary taxes for ordinary purposes, upon the condition of an annual payment to the State. Had the Legislature exempted their property from ordinary taxation, in consideration of their

doing some service to the State—such as carrying troops or public stores free of charge, no one would call the service a tax, or question the validity of the exemption. It would be a privilege granted for a service rendered. This is the precise character and effect of the act in question. The same principle runs through various laws. In respect to these same Companies, because it was believed they would confer important benefits upon the public, by the construction of their roads, the right was granted to them, in the name and on behalf of the state, to take private property for their use, upon just compensation. For like reasons, a law was, until recently, in force authorizing individuals to erect mill-dams upon their own lands, and thereby cause the lands of others to be overflowed, making such compensation only as the law provided for. The various cases of exemption, before referred to, are but examples on the same principle,—a privilege granted in consideration of some real or supposed benefit conferred upon the public or the State. Now, the Legislature having full power to grant the privilege of exemption to these companies, has done it upon its own terms, that of paying to the State a portion of their annual income, and I see no ground of principle upon which to deny the power, or to question its rightful exercise.

But, allowing to the defendants the benefit of their own premises in their broadest scope, I am still forced to the same conclusion. It is contended that the payment to the State, being a tax, and the amount of such tax being regulated by the amount of annual income while all other taxes are governed by the judgment of assessors as to the value of property, “the rule of taxation” is not “uniform.”

Were the complainants alone subjected to this rule, I am not prepared to say the objection would be without foundation. But all Railroads and Plank roads are subject to the same rule. It is, doubtless a departure from the general law, and amounts to a declaration that this class of property shall have a rule by itself. But is such a distinction incompatible with the constitution? Many taxes for local and special purposes have been levied and collected, without an assessment made in conformity to the general law. Almost every town, and especially almost every city and village in

the State, present instances of this species of taxation, for roads, streets, side-walks, and other local improvements. The Constitution of the United States declares, that "all duties, imposts, and excises shall be *uniform* throughout the United States." But no one has contended that the same duty, impost or excise, should be imposed upon every species of property. On the contrary, Congress, which has the sole power, "to levy and collect taxes, duties, imposts and excises," requires different classes of articles to pay different duties,—some higher, and some lower—regulating the duty on some kinds of property, by the value, and on others by the quantity. Yet, I have never found a judicial decision, holding that because one class of property paid one rate of duty, and another class a different rate, the duties were not "uniform."

If, upon the same class of articles, there had been one rate required at New York, and a different one at Boston or New Orleans, doubtless the constitutional provision would have been violated. So, in the present case, had the legislature prescribed one rate of taxation, for one town or county, and a different rate for other towns or counties, there could be little doubt of its error. But, so long as each class of property, in every part of the State, and under like circumstances, is subjected to the same rule, it is difficult to see how the principle of the Constitution is violated, much less how the law is so grossly and palpably wrong, as to warrant the interference of the Courts, declaring it absolutely void. I see no constitutional objection to a law, (should the legislature see fit to pass one) exempting all sheep in the State from taxation, or to a law requiring all woolen or cotton factories, to pay to the State Treasurer one per cent. of their gross earnings, as a commutation for all ordinary taxes. Yet, should the legislature by law, declare the sheep of one man exempt, or authorize one manufacturing company to pay a bonus in lieu of general taxation, there would be good reason for holding that the rule was not uniform, and that such law was void.

Under any view which I have been able to take of this case, I cannot but regard the act of April 1st, 1854, (whether its provisions be wise and equal or otherwise,) as *within the constitutional powers of the Legislature*, and therefore *valid*.

The defendant's demurrer must be over-ruled.

## RECENT ENGLISH CASES.

*Court of Common Pleas, England. Trinity Term, 1855.*

SWEET AND OTHERS vs. BENNING AND ANOTHER.<sup>1</sup>

1. By stat. 5 & 6 Vict. c. 45, s. 18, when the proprietor of any periodical work shall employ any person to compose any article thereof, and the same shall have been composed on the terms that the copyright therein shall belong to such proprietor, the copyright shall be the property of such proprietor: *Held*, that these terms need not be expressed, but may be implied.
2. Where an author is employed by the proprietor of a periodical work to write for it articles on certain terms as to the price, but without any mention of the copyright, it is to be inferred that the copyright was to belong to such proprietor.
3. The defendants, who were proprietors of a periodical professing to be an analytical digest of equity, common law, and other cases, copied verbatim the head or marginal notes of cases from reports, the copyright of which was in the plaintiffs, without their consent: *Held* to be a piracy, (Maule, J., *dissentiente*.)

This was an action against the proprietors of a periodical called *The Monthly Digest*, for a piracy of the reports in *The Jurist*. The declaration alleged that the plaintiffs were the proprietors of *The Jurist*, and of the copyright of the reports therein, and that the defendants wrongfully, and without the consent in writing of the plaintiffs, printed for sale and sold in the *Monthly Digest* copies of portions of the reports in *The Jurist*. The defendants pleaded several pleas, of which the first was not guilty, and the third was a denial that the copyright in the reports was the property of the plaintiffs. They also delivered notice of various objections under the act, to be relied on at the trial, which it is not necessary to set out here, but by which the defendants disputed that *The Monthly Digest* was a piracy of any of the reports in *The Jurist*, and that the copyright in such reports was the property of the plaintiffs. The replication took issue on the second and third pleas, and the cause came on for trial at the first sittings in Michaelmas Term, 1853, when a verdict was taken for the plaintiffs, damages 40s., subject to the opinion of the Court on the following case: The plaintiffs are law publishers and booksellers,

<sup>1</sup> 16 *Jurist*, 548.

and are, and have been from the time of its first publication, proprietors and publishers of the weekly periodical called *The Jurist*, which has been published every week since the 14th January, 1837, the date of its first publication. On the 30th March, 1853, the plaintiffs caused the following entry to be made at Stationers' Hall, which entry was proved at the trial. [The case here set out a copy of such entry. The plaintiffs were therein described as the proprietors of the copyright of *The Jurist*.] The Court was to be at liberty to refer to all or any of the numbers or volumes of *The Jurist* and *The Monthly Digest*, and to all the books and reports cited in the numbers of the said *Monthly Digest*, and complained of, and all other law reports and digests, for any purpose necessary to the decision of the case, and to draw all such inferences of fact as a jury would be authorized to draw. The reports of decided cases in *The Jurist* always have been supplied by gentlemen of the bar, whose names appear at the top of those reports respectively. These gentlemen have been and are employed by the plaintiffs for the purpose, and they compose and furnish, with and as part of their report, a side or head note, or compendious statement of the decision in each case. In *The Jurist* the said note appears at the head of each report. The arrangement between the plaintiffs and these gentlemen was verbal, and to the effect that the reporters should furnish the plaintiffs with reports of such cases as they thought desirable for publication in *The Jurist*, upon the terms of being paid so much per printed sheet. There was no reservation by them of any right to publish the cases themselves, or of any copyright in such cases, nor was it expressed between the parties that the copyright should belong to the plaintiffs. In fact, nothing passed between the parties upon the subject. The reports, however, have always been made exclusively for *The Jurist*, under the employment before mentioned, and have always been inserted without alteration. All the cases, the piracy of which is complained of, were duly paid for according to the terms of the employment. The plaintiffs are the proprietors of *Harrison's Digest*, and they publish annually a digest as a supplement to that work. The plaintiffs, Stevens & Norton, are the proprietors and publishers of

Jeremy's Digest. These digests, and other digests of a similar nature, are compiled from the head or side notes of the reports published during the year. No leave is asked for such publication, or considered necessary, the plaintiffs respectively, or some of them, being entitled to the copyright of the greater portion of the reports referred to in such digests. The defendants are the proprietors of a periodical called *The Monthly Digest*, five numbers of which accompanied the case, and which numbers had been given in evidence at the trial. In the compilation of such digest the defendants had recourse to the various publications then extant, including *The Jurist*, in which the cases were reported, and in some instances to the notes of the defendant, Lovell, taken in court when the cases in those instances were argued. In all the cases in which reference was solely or first made to *The Jurist*, the side notes were copied from *The Jurist*. The number of cases purporting to be digested by the defendants, in the five numbers given in evidence, ranged from three hundred to four hundred in each number, and the number of such cases in which the side notes had been copied from *The Jurist*, were as follows:—Eleven in No. 1; thirteen in No. 2; twenty-six in No. 3; twelve in No. 4; and thirteen in No. 5. The questions for the opinion of the Court were, first, whether the copyright in the reports in *The Jurist*, or in the head or side notes thereof, or in both, belonged to the plaintiffs; and, secondly, if so, whether the publication in the *Monthly Digest* of the said head or side notes was or was not a piracy of the plaintiffs' said copyright. If the opinion of the Court should be in favor of the plaintiffs upon the points both of copyright and piracy, the verdict entered for the plaintiffs for 40s. was to stand, with the certificate given at the trial, to entitle the plaintiffs to costs. If not, the verdict was to be set aside, and a nonsuit entered.

After argument by *Lush*, (June 5,) (*Byles*, Serjt., was with him,) for the plaintiffs, and

*Butt*, Q. C., (*P. Burke* with him,) for the defendants,

JERVIS, C. J.—We are clearly of opinion that the copyright is the property of the plaintiffs, but we wish to consider the question of piracy. *Cur. adv. vult.*

There being a difference of opinion among the learned judges, the following judgments were now (June 8) delivered:—

JERVIS, C. J. — In this case, which was argued the other day, and in which the Court took time to consider one of the points, there were two questions, first, whether the plaintiffs had a property in the copyright, under the 5 & 6 Vict. c. 45, s. 18; and, secondly, assuming that they had that right, whether there was a piracy, so as to give them a right to maintain an action. In the course of the argument, I intimated the opinion of the Court that the plaintiffs had a copyright within the meaning of the eighteenth section; and on consideration, I now entertain that opinion; because, where the proprietor of a periodical employs a gentleman to write expressly for that periodical, of necessity it is implied that the copyright of the article written expressly for that periodical, and paid for by such proprietor of the periodical, should be the property of such proprietor; otherwise it might be that the author, the day after the publication of the periodical, might publish his works in a separate form, and there would be no property, or benefit, or corresponding return to the original publisher for the payment made to the author. I think, and the rest of the Court concur in that opinion, that there is an implied condition, undertaking, or arrangement between the parties, that the gentleman employed under those circumstances writes for the publisher and proprietor of the periodical, who acquires a copyright in the article so written and published. The question of piracy was one that at the time seemed to the Court a more difficult one, and on which I regret there is still not an unanimous opinion; but, upon the best consideration I can give to the case, it seems to me that there was a piracy on which the action may be founded. It is difficult to lay down a general rule upon this subject; and I do not adopt or subscribe to the proposition propounded by Mr. Lush, that the printing of every portion of a work would be the foundation of an action. I think it is a question of degree, which must be varied by the different circumstances of each case. In this case there has been, I think, an abuse of the fair right of extract or comment, and, in truth, a republication or reprint of a composition, the pro-



perty in which was in the plaintiffs. The work from which this has been taken, The Jurist, consists of double reports of each case—one in which the reporter professes to give a detailed report of the case, with the argument and the judgment of the Court at length; and the other, an abstract of the case in the shape of a marginal or head note, in which he furnishes the principle of law and a short and summary statement of the facts; they are, in truth, two reports—a long and a short report; and the gentleman who has compiled this digest has taken verbatim, as the case states, the short reports to which I have alluded. If he may be allowed to do that, it is plain that he may take the other, viz. the lengthened one, or he may take both; and the question is, can he, by any different arrangement of the reports, or digest, as he calls it, take them? In my opinion he cannot. I quite subscribe to the doctrine that a digest may be well made without subjecting the party making it to an action, where the author of the digest applies his mind to the subject, and extracts from the case the principle of law by the labor of his own brain, and so produces an original work; but here this is merely (except the analytical arrangement, which is a mere mechanical operation), that of cutting out the whole of the marginal notes, or head notes, as they are called. In my mind, the case referred to, of *Butterworth vs. Robinson*, is decisive of this case, because, there the complaint was, that, omitting the arguments, the party who was the alleged pirate had reprinted the reports, including the judgment of the court; and although he had arranged them alphabetically, under appropriate heads, for the purpose of easy reference, it was held not to be a ground of protection, but he was held to have pirated the work of the original author, and the Lord Chancellor granted an injunction. On these grounds, I think, on both points, that the plaintiffs are entitled to recover, and that our judgment must be for the plaintiffs.

MAULE, J.—With respect to the first point, whether the plaintiffs had a property in the reports as the proprietors of the book for which they were written, I think that the case is within the provision of the act of Parliament, which says, that if articles are written for any periodical work, which would comprehend the

work of the plaintiffs, and they are written by a person employed to write for the proprietor, and upon the terms that the copyright shall belong to such proprietor, and shall be paid for by such proprietor, the copyright therein shall be the property of such proprietor. It was urged in this case, that here it was not a contract upon the terms that the copyright should belong to the proprietors, because there were no express words conferring the copyright on the proprietors. I think that although there are no express words to be found here, when a person employs another to write a book, or to do anything else for him, it is to be inferred from that, if there is nothing to show the contrary, that such a writing or work is produced and done by the person so employed, on the terms that it shall belong to the employer. I think, therefore, that the plaintiffs in this case, as proprietors of *The Jurist*, can maintain the action for a piracy of the work; but, with respect to the act complained of as a piracy, I do not so clearly concur in what my Lord Chief Justice has expressed, and what I understand is the opinion of the other learned judges who will pronounce their opinions after me. It is not very wonderful that there should be some difference of opinion upon such a subject, because it is hardly so much a matter of kind as a matter of degree. It is difficult to draw a line where the act is only a question of quantity, but it is more easy to draw the line where the question is, whether the thing is colorable, and so unlawful. In this case the inclination of my opinion is, that this is a different work, and made with a different object, and with a different result, from the work of the plaintiffs. It may be that some persons may be able to dispense with, or may be induced to dispense with, the work of the plaintiffs, by purchasing or using that of the defendants, though a very imperfect substitute for it; and I should doubt whether, in any case, it would enable a person to dispense with the plaintiffs' reports when he really wanted them. Probably it may enable persons to buy more cheaply the means of finding out what had been decided by the courts, without going to the expense of buying the reports in extenso. When, however, a report is known to exist that may have some probable application to a case, then recourse, I should

think, would be ordinarily had to the report itself at length; and thus it may induce persons to buy the report itself, or have recourse to it in the libraries of institutions, or combinations of persons. But I think its having that effect is no argument in favor of this being a piracy, but rather the contrary, because it seems to do a something which is not required by persons who want to use those reports. Then it is said, and so my Lord Chief Justice considers, that these marginal notes constitute another report. I do not think that that is the case; for though marginal notes in some instances do constitute another report, those are not the best marginal notes, and the reporter has recourse to them when he cannot give what I consider the more legitimate marginal note, which is not a different report of the circumstances of the case, and a statement of the conclusions drawn from them, but a statement of the principle or doctrine of law which is considered to be established by the case at length, without stating at all how it arises. In no sense is it, or is it like, a report; and that takes away what was pressed upon us in the argument — the idea, such as it is, of there being in these cases a double report. They are not, in my opinion, double reports; but they are what they are — marginal notes. In some respects they are occasionally an abridgment of the reports; that is, when the reporter is unable to extract some very clear doctrine of law capable of being stated conveniently in an abstract, he then relates all the circumstances of the case, and says: "If A demises to B by a certain instrument, and afterwards B dies, and makes a will in such and such terms," and so forth. Such a marginal note is no doubt another report; but that is not the usual style of a marginal note. Well, then, it is true that the very words of these marginal or head notes, and the head notes of a considerable number of other reports that are published during the month, are contained in this publication of the defendants. Now, it is agreed that it is not every verbatim extract that is the subject of an action of piracy. It will depend upon the proportion the verbatim extract bears to the whole work. Nobody denies that the mere length of these extracts is not such as to make it the subject of a piracy in that respect. Now, it must be

taken, I conceive, in this action, that the plaintiffs are the only persons who complain of what the defendants have done. What the defendants have done is this — they have devised, or adopted from somebody else, a certain scheme of distribution of the doctrines of law which are promulgated by the courts within the last month, and of putting them into such an order or arrangement as affords convenience to the profession, and those who have occasion to use the law books, in inquiring into questions of law. The order and arrangement the plaintiffs had no right to complain of, as that is not their own; and according to that order and arrangement the defendants have distributed a considerable quantity of matter containing such legal propositions, of which by far the larger part is what the defendants are entitled, under some circumstances, to be considered the owners. Now, certainly, under that state of things, it seems to me that the defendants have made a book differing altogether from the plaintiffs' book, and effecting a different purpose from the plaintiffs' book. I conceive, therefore, they have not, in the sense in which it is unlawful, taken any part from the plaintiffs' book, but that they have dealt no otherwise with it than a person does who, to support some argument or view of his own, makes extracts from the book of another person, without any intention of evading the right of the person to publish the whole or a part of it. As I said before, I have had some difficulty in drawing the line, and very likely I have not taken the right side. If the case had been of sufficient importance, I should have desired more time to be taken to have further considered it; to revise my opinion; and certainly to express more fully and clearly what are the reasons that induce me to come to my present conclusion.

CRESSWELL, J.—With respect to the first point, it is unnecessary for me to add anything to what has fallen from my Lord, with whom I agree; and as to the second point, I agree with my Brother Maule that it is difficult to draw the line in all cases, between that which may be called an extract for the purpose of comment, or for the purpose of illustration, and that which is taken for a mere piracy; but it seems to me that the plaintiffs are on the right side of the line in this case. This portion of the plaintiffs'

work is taken, not for the purpose of illustrating anything, but for the purpose of making it the subject-matter of sale in itself, and for selling it for itself, though it is sold together with other things that are taken from other books. That seems to me to place it on the side of the line the plaintiffs contend for, and that therefore they are entitled to treat it as a piracy. Therefore I think the judgment must be in favor of the plaintiffs.

CROWDER, J. — I have arrived at an opinion similar to that of my Lord and my Brother Cresswell, after much difficulty and doubt; indeed, during the argument, I own that I entertained considerable doubts upon both points, both as to whether the plaintiffs had a property in the work, and as to whether this was a case of piracy; because, looking to the language of the eighteenth section, in which it is said that in order to obtain a property in the composition, the proprietor of the periodical, (who is in the situation of the plaintiffs,) employing others to write for him, must employ them on the terms that the copyright therein shall belong to such proprietor; and looking to the language of this case, where it appears that there was a verbal agreement between the plaintiffs and the proprietors as to the terms of payment, and that nothing was said of any other terms; however, on carefully considering the nature and the whole extent of this section, it would seem that the intention was, not that there should be any express stipulation as to the terms, but that the terms might be inferred from the nature and character of the employment; and sitting here with the powers I have, I have arrived at the conclusion that the inference to be here drawn would be quite inconsistent with the nature of such employment, if the copyright should not pass to the plaintiffs. Upon the second point I had entertained much more doubt, and still, in delivering my opinion, I must do so with very considerable doubt, particularly as my Brother Maule has expressed himself to be of a contrary opinion; the difficulty I have had being, that it certainly is not a publication, upon the part of the defendants, with the same object or result, or with any intention, as it seems to me, to interfere with the property of the plaintiffs. Looking to the nature of the two publications, I think it fair to arrive at that

conclusion. The question is, whether, it not being with the same object, and having a different result, and being without any intention to injure the plaintiffs, it is a piracy. But upon looking to the act of Parliament, I think that, notwithstanding this, it amounts to a piracy within the express provisions of the act; because the fifteenth section of the act of Parliament, when taken with the interpretation clause, amounts distinctly to this—that a person is guilty of piracy who prints, or causes to be printed, for sale, any book, the copyright in which belongs to another, without his consent. Now, the nature of this which has been published by the defendants you find to be clearly a part, and a considerable and very important part, of the work of the plaintiffs. It has been said in argument that there were two reports furnished—one a full and the other an abridged report; and that if the defendants could take the abridged report, they might also take the full one. There is, I think, a good deal in the observations made by my Brother Maule on that point, and I am inclined to think with him, that the marginal note is not a second report; but that does not seem to me at all to forward the argument as against the plaintiffs. The note which is taken by the defendants is not a mere second report, or an abridged report, which could be easily done, but something that requires a still greater exertion of mind in the author, namely, in abstracting, after careful consideration, and writing down in concise language, the point and substance of decision, and the rule of law that arises out of that decision. Is it, or is it not, then, something substantial which the plaintiffs have a copyright in, and which the defendants have sold and published for sale? It seems to me that the object of the defendants was clearly to put together, in a manner of their own, and for a purpose quite different from that of the plaintiffs, a series of results of the cases that took place during the month. Nevertheless they do extract bodily the note which was the substance and brain of the individual who wrote for the work. I find a difficulty in coming to this conclusion. The book of the defendants seems undoubtedly a very good and useful book, and one which it is proper should exist; but I feel bound to

arrive at the conclusion, though reluctantly, that it does seem to me to fall within the language of this act of Parliament; and that for these reasons there must be judgment for the plaintiffs. Judgment for the plaintiffs.

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*Court of Queen's Bench, England.*

BUTCHER vs. THE LONDON AND SOUTH-WESTERN RAILWAY COMPANY.<sup>1</sup>

1. Carriers by railway—Delivery of luggage to passengers.
2. A railway company, as common carriers of passengers and their luggage, are bound, on the arrival of a train at the terminus of the journey, to deliver a passenger's luggage into a carriage to be conveyed from their station, if required so to do, and if such is their usual practice.—Affirming *Richards vs. The London and South Coast Railway Company*.<sup>2</sup>
2. Therefore, where a passenger on the arrival of the train got out of the railway carriage on to the platform with a part of his luggage, a small hand-bag, in his hand, which he gave to one of the company's porters to take to a cab, and the porter lost it, the company were held liable as for a non-delivery of the bag; it not being found by the jury that the passenger, by taking the bag into his own possession on the platform, had accepted that as a performance of the company's contract to deliver, according to their usual practice, into a cab.

APRIL 16, 1855. — The declaration stated, that the defendants were owners of a railway for the carriage and conveyance of passengers and their luggage from Farnham station, Hampshire, to Waterloo bridge station, London, and were common carriers for hire in and upon the said railway; that the plaintiff became a passenger on their said railway, to be carried and conveyed from Farnham to the Waterloo bridge station, and that the defendants, as such common carriers, received the plaintiff and divers chattels of the plaintiff, to wit, a carpet-bag, &c., to be safely and securely kept and carried by the defendants as such carriers along their railway, and at the end of their journey to be safely and securely delivered up to the plaintiff for reasonable reward to the defendants in that behalf. Breach, that the defendants did not safely

<sup>1</sup> 24 Law Journ. C. B. 137. The arguments of counsel are omitted.

<sup>2</sup> 7 Com. B. Rep. 839; s. c. 18 Law J. Rep. (n. s.) C. P. 251.



and securely carry or deliver the said chattels, but took so little and such bad care in and about the carrying and conveying the same, that by and through their negligence the carpet-bag was lost.

Pleas, *inter alia*, not guilty, and a traverse that the defendants received the plaintiff with the said chattels to carry, convey and deliver *modo et formâ*. Issues thereon.

At the trial before Maule, J., at the last Spring Assizes at Kingston, it appeared that the plaintiff in November last took tickets for himself and his wife as passengers by the defendants' railway from Farnham to the Waterloo bridge station, and that his luggage consisted of a portmanteau, which was placed in the luggage-van, and a small hand-bag containing money and valuable articles worth £240, which he kept in the carriage with him. On the arrival of the train at the Waterloo bridge station the plaintiff got out of the carriage with the bag in his hand, and the portmanteau was placed on the platform, and his wife sat down upon it. One of the company's lamp-cleaners, who was dressed as a porter, shortly afterwards came up and said to the plaintiff, "Cab, sir?" The plaintiff having said "Yes," the man took the bag from the plaintiff's hand, and disappeared among the rows of cabs attending at the station, and shortly after returned to take the portmanteau. The plaintiff inquired what he had done with the bag, and he said he had put it on the foot-board of a cab, and took the plaintiff to the cab, but the bag was not there, and the driver denied that it had ever been put there. Search was made among the cabs and at the station for it, but without success, and the bag was lost. It appeared also that no persons were allowed to assist as porters at the station but the company's servants; and that it was usual for the porters to assist, without any gratuity being given them for so doing, in removing passengers' luggage from the platform to the cabs which were allowed to attend at the station; and that as each cab left the station, a servant of the company took the number of the cab, and ascertained where it was going to.

On this evidence the defendants' counsel contended that the

plaintiff ought to be nonsuited, but the learned judge left the case to the jury, and they having found a verdict for the plaintiff, he reserved leave to the defendants to move to set the verdict aside, and to enter a nonsuit if the Court should be of opinion that there was no evidence to support the declaration.

*E. James* having obtained a rule *nisi* accordingly,—

*Montague Chambers* and *Lush* now showed cause.

*Bovill*, in support of the rule.

JERVIS, C. J. — At first I was strongly of opinion that this rule ought to be made absolute, as I thought, until I heard the ingenious way in which the case was put by Mr. Lush, that there had been a perfect delivery to the plaintiff, and that he had afterwards given instruction to the porter to get a cab for him, and had made himself responsible for the safety of the bag. But I think that is not so, and that this rule ought to be discharged. It has been decided in *Richards vs. The London and South Coast Railway Company*, that it is part of the contract by the company that the delivery of passenger's luggage shall be in the usual mode in which such delivery is made by them on the arrival of the train at their station, that is, in this case, by the porters of the company to cabs within the station. There is no question, though that may be the usual mode of delivery, yet that a passenger may, if he pleases, have something short of that to satisfy the contract; and it was open to the defendants to have shown, (though they might have had some difficulty in doing so with the jury) that the plaintiff, in this instance, had accepted some delivery other than that he had contracted for, and whether he had done so or not was a question for the jury. This rule is to be made absolute only if my Brother Maule ought, on the evidence at the trial, to have nonsuited the plaintiff. Now, in the absence of any finding by the jury that the plaintiff, when he stood on the platform with the bag in his hand, had accepted a delivery in fulfilment of the contract short of what he was entitled to, I cannot say, as argued by Mr. Lush, whether he intended to do so or not, especially as it appears that he intended to have a cab for the rest of his luggage. The further point does not arise, whether the company would have been liable if the bag had been

stolen from the cab before it left the station, because, if there had been no delivery to the plaintiff when he stood with the bag in his hand upon the platform, and that was a question of fact for the jury, the company have not shown what became of the bag after it was taken from the plaintiff. For aught that appears, it was never delivered at all, and then this case is the same as *Richards vs. The London and South Coast Railway Company*. This rule must, therefore, be discharged.

CRESSWELL, J.—I am of the same opinion. There was *prima facie* evidence that the bag in this case was delivered to the company to be carried. If it was contended that that was not the case by reason of the plaintiff taking the bag into his own custody, the question ought to have been put to the jury. Then the question is, did the defendants fulfil their undertaking? According to the decision in *Richards vs. The London and South Coast Railway Company*, they were bound to deliver according to their usual practice, that is, into a cab, if the passenger wished it. It is clear that they did not do so in this case. There might be evidence that the plaintiff accepted some other mode of delivery, instead of the usual one, but the defendants did not ask to have that question left to the jury, and they cannot now ask us to find it in their favor. Then there is a third question, whether the plaintiff was himself the cause of the loss, so as to excuse the company. I think that cannot be imputed to him. He delivered the bag, not to a stranger, but to a man wearing the livery of the company and one of their servants, and cannot be said, therefore, to have prevented them from performing their contract.

WILLIAMS, J.—I am of the same opinion, and I think the judge upon the evidence could not have nonsuited the plaintiff without overruling *Richards vs. The London and South Coast Railway Company*. It is suggested, that it would be hard upon the company to make them liable for the loss of this bag, if after the lamp-cleaner had been deputed by the plaintiff as his agent to select any cab into which to put the bag, and he had selected one and placed the bag in it, the cabman had driven off with it. Certainly, if that was the case, it is very much to be regretted that it

was not proved, for I should have had great difficulty in saying that the company in that case were liable.

CROWDER, J. — I also think that the judge ought not to have nonsuited the plaintiff. There was evidence that the bag was given to the company to be conveyed and delivered, and it appeared that the usual mode of delivery adopted by them was, that when the luggage arrived at the terminus, the company's porters, if required so to do, assisted in carrying it and placing it on cabs within the station; and that assistance, as it seems to me, was included in the company's contract, for no gratuity is given by the passengers to the porters for it, but it is included in the fare paid at the commencement of the journey, and it is, of course, an advantage to the company to have the luggage removed from the platform as speedily as possible. The only distinction between this case and *Richards vs. The London and South Coast Railway Company* is, that the plaintiff here had the bag in his hand on the platform after the arrival of the train, but as it is not found that he had elected to treat that as a complete delivery, and as he intended to have a cab, and gave the bag to one of the company's porters to deliver to a cab, and, for anything that appears to the contrary, the porter did not deliver it, there was no delivery according to the contract. The case is much the same, as put by Mr. Lush, as if the plaintiff had got out of the carriage without the bag, and the porter had then handed it out. I think, therefore, that this rule should be discharged. Rule discharged.

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#### ABSTRACTS OF RECENT ENGLISH DECISIONS.

*Affidavit.*—The taking of an affidavit is a ministerial, not a judicial act. *Kerr vs. The Marquis of Ailsa*, 1 Macq. Scot. App. Cas. 736. (H. of L.)

*Criminal Law—Disposing of the body.*—There need not be a final disposing of the dead body of the child to constitute an offence within the 9 Geo. 4, c. 31, s. 14, but it is sufficient if there be only a temporary disposition of the body, with the intention of concealing the birth. (See

Reg. vs. Goldthorpe, 2 Moo. C. C. 244.) *Reg. vs. Jane Perry*, 1 Jur. 408, N. S. (C. C. R.)

*Criminal Law—False pretences—Want of sufficient allegation of false pretence.*—The indictment alleged that the defendant falsely pretended a sum of money, parcel of a certain larger sum, was “due and owing” to him for work which he had executed for the prosecutors: Held, that this was not an allegation of false pretence of an existing fact, as the allegation in the indictment might be satisfied by evidence of a mere matter of opinion, either as regarded fact or law; and therefore that the indictment was bad. *Reg. vs. Henry Oates*, 1 Jur. 429, N. S.; 19 J. P. 309. (C. C. R.)

*Contract—Warranty—Breach.*—The seller of a book-case warranted it to be an ancient book-case, but it was a modern one. The purchaser refused to receive it, or pay for it, notwithstanding he had received and paid for other goods bought of the same seller at the same time: Held, that the purchaser was not liable. *Woodgate vs. Welton*, 16th Nov. 1854. (Exch.) Lovell’s Dig. 1855, p. 23.

*Contract—Warranty.*—An undertaking in a general contract, not for the sale of specific flour, but of a given quantity of flour, that it shall be of a certain kind or quality, is not a representation but a warranty; and, if binding, it is as part of the contract itself; and if the contract be within the statute of frauds, and the note in writing only specifies that the flour is to be “extra superfine,” and does not notice an undertaking previously given by parole, that it shall be equal to a certain sample, or to certain specific flour already sold, an action will not lie for delivering inferior to such sample, if it be “extra superfine,” either on the ground of warranty or false representation; and even assuming that an action would lie to recover the price on the ground that it was paid under a mistake of fact, in supposing the flour delivered was according to the contract, when it was not, such an action will not lie where the buyer has retained and used or sold a larger portion of the flour than was necessary for the purpose of trial to ascertain if it were according to the contract. *Harnor vs. Groves*, 3 Com. L. Rep. 406; 24 L. J. 53. (C. B.)

*Devise—Lapse.*—Testator gave his residuary real and personal estate to his wife, her executors, administrators, and assigns, but if she should die intestate, then over. The wife having died in the testator’s lifetime, the gift over held to have lapsed, and not to have taken effect. *Hughes vs. Ellis*, 24 L. J. Ch. 391, Master of the Rolls.

*Easement—Right of Way.*—A right of way of necessity can only arise by grant express or implied, and therefore, not in the case of an escheat. *Proctor vs. Hodgson*, 24 L. J., Ex. 195.

*Ecclesiastical Law—Divorce—Cruelty—What amounts to a revival after condonation.*—Cruelty fully condoned is not revived by subsequent desertion. In order to revive condoned cruelty, the acts must be *ejusdem generis*. *Hart vs. Hart*, 2 Eccl. & Adm. Rep. 193. (Prerog.)

*Equity—Constructive Notice.*—Constructive notice is a doctrine not to be extended. When a purchaser is sought to be affected with Constructive Notice, the question is not whether by cautious prudence, he might not have acquired knowledge, but whether his not obtaining it was an act of gross and culpable negligence. *Ware vs. Egmont*, 24 L. J., Ch. 361, Lord Chancellor.

*Evidence—Secondary Proof.—Semble*, that secondary evidence is admissible of the contents of a private document in the possession of a party who is beyond the jurisdiction of the Court, and who refuses to produce it. But the mere demand of the document made by a stranger, who does not disclose his object in making it, is insufficient to render the evidence admissible. *Boyle vs. Wiseman*, 24 L. J., Ex. 160.

*Insurance—Money advanced on freight—Average contribution.*—A custom that an insurer of money advanced on account of freight is not liable to a general average loss or contribution, is in derogation of the written contract, and cannot be set up in bar of an action on the policy. *Hall vs. Janson*, 24 L. J. 97. (Q. B.)

*Landlord and tenant—Right of outgoing tenant to manure and fixtures.* An outgoing tenant cannot recover the value of manure which he is bound to leave on the farm, nor the value of fixtures which were not severed by him during his occupation. *Tyler vs. Hook*, 19 J. P. 326. (C. B.)

*Landlord and tenant—Surrender by operation of law.*—Where a landlord has agreed to accept another person as his tenant, to whom a lease is to be granted, and the outgoing tenant remains in possession, there is no surrender by operation of law until a lease has been executed and the lessee admitted into possession. *Ibid.*

*Life Insurance—Suicide.*—Declaration by executors, on a life policy containing conditions: First, that policies effected by persons in their own

lives, who should die by their own hands, would become void, so far as regarded the executors or administrators of the person so dying, but would remain in full to the extent of any *bona fide* interest which might have been acquired by any other person under an actual assignment by deed for a valuable consideration in money, or by way of security or indemnity, or by virtue of any legal or equitable lien as security for money, upon proof being given to the directors to their satisfaction; and secondly, if a person, who should have been insured on his own life for at least five years, or should have paid a sum equivalent to at least five years premiums, should die by his own hands, the directors should be at liberty, if they thought proper to do so, but not otherwise, to pay for the benefit of the family, or plea that the insured died by his own hand. Replications—first, that before the death of the insured, K. acquired a *bona fide* interest in the policy by actual assignment by way of security for money within the meaning of the conditions, and proof of the extent of such interest was before action given to the directors to their satisfaction; and secondly, before the death A. K. acquired a *bona fide* interest in the policy by virtue of an equitable lien as a security for money, and proof of the extent of such interest was before action given to the directors to their satisfaction: *Held*, on demurrer to the first replication, that it was bad for not shewing that the alleged assignment was by deed. *Held*, also, that the second replication was proved by evidence that the deceased had, before marriage, given a bond conditional to secure £5000 to his intended wife, and that subsequently not being able to do so, an agreement was made succoring different members of his family, by which the insured was to insure his life for the benefit of his wife, and she was to keep up the premiums out of her private income; and that in pursuance of such agreement, he did insure, and handed over the policy to K., as trustee for the wife, intending to assign regularly, but that he did not so assign, but died by his own hands, which facts were made, however, to the directors. *Held*, further, that such evidence was sufficient to shew the policy was in the hands of K. an equitable lien, and that the directors ought to be satisfied, it not being necessary to show that they were in fact satisfied. *Held*, finally, that the policy was not bad in law as tending to encourage suicide. *Moore vs. Woolsey*, 19 Jurist, 468, Queen's Bench.

*Master and servant—Grounds of dismissal.*—The declaration stated that the plaintiff entered into the service of the defendant for a term of three years, under an agreement that he, the plaintiff, would during that



time use his best endeavors to promote the interests of the defendant, and would attend to and carry out all reasonable requests. Held, in an action for wrongful dismissal, before the end of the term, that a plea that the plaintiff did not, whilst in the defendant's employ, use his best endeavors to promote the interests of the defendant, according to the agreement, wherefore he was dismissed, disclosed a good defence. *Arding vs. Lomax*, 24 L. J. 80. (Exch.)

*Master and servant—Seduction—Temporary visit.*—The plaintiff's daughter, who had formerly been in the defendant's service, and was living with her parents, at the defendant's request, and with the consent of the plaintiff, went and resided at the defendant's house for a month, to attend to his business during the absence of his wife; and the defendant promised to pay her something for so doing; and when she left, defendant's wife gave her 8s. During the time she so resided with the defendant he seduced her: Held, that the above facts were not inconsistent with the relation the daughter held of servant to the plaintiff; and that an action for her seduction was maintainable by him. *Griffiths vs. Teetgen*, 24 L. J. 35 (C. B.)

*Ship and Shipping—Policy of Assurance—Warranty—Time of sailing.*—In a policy of assurance from New York to Quebec, during the ship's stay there, and thence to the United Kingdom, the ship was warranted to sail from Quebec, on or about the first of November. Held, that the policy covered the loss after the first of November, during the voyage between New York. *Baines vs. Holland*, 3 Com. L. Rep. 593, (Exch.)

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## NOTICES OF NEW BOOKS.

A General Digest of the Principal Matters contained in the Exchequer Reports from 1824 to 1854 inclusive. Edited by Asa I. Fish. Philadelphia: T. & J. W. Johnson. 1855. Calf, 8vo, pp. 872.

We learn from the publisher's preface to this work, that it "embraces the decisions of the Court of Exchequer, and Exchequer Chamber, from the Reports of McClelland and Younge, in 1824, to the ninth volume of Welsby, Hurlstone and Gordon, in 1854, inclusive. In its plan and

arrangement," it is said, "it does not differ materially from Wise's Index to Meeson and Welsby, which has met general approval, and which is incorporated in its pages. It is believed to present a comprehensive and accurate abstract of the decisions of the Exchequer Tribunals, during a period when commercial law has been illustrated with a copiousness, learning and ability, perhaps never equalled in Westminster Hall; and is submitted to the profession with a hope that it may meet a want which the publishers have long been requested to supply."

We have examined the "Exchequer Digest" with care, and can pronounce it to be remarkably well arranged and executed. It exhibits every evidence of accuracy and judgment on the part of the learned editor. More than this, it will not be becoming in us to say. Of the materials of the Digest, however, we can speak. The reports from which it has been compiled, are of the decisions of unquestionably the ablest Court, taking it as a whole, which England has seen for many years. Individual judges may now and then have shown more extraordinary genius, but rarely has the bench of any country exhibited a combination of men of greater acuteness, learning, good sense, and general capacity, than those who have sat in the Exchequer during the last thirty years. In that period every branch of law has come in review before them, and been discussed with equal originality, profoundness and subtlety. With a remorseless logic they have exposed their predecessors' errors, and weeded out the false doctrines which had grown up over many fields of jurisprudence. Without a thorough familiarity with the results of their labors, no man at the present day can call himself a complete lawyer. Mr. Fish's Digest is the harvest of these thirty years, and we can warmly recommend it to our readers. It will be found equally useful to those who do not, as to those who do possess a full series of these reports.

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The Reporters, chronologically arranged: with occasional Remarks upon their respective Mérits. By John William Wallace, Master in Chancery for the Supreme Court of Pennsylvania. Third edition, revised. Philadelphia: T. & J. W. Johnson. 1855. Calf, 8vo, pp. 424.

Bibliography, which, in other branches of literature, is somewhat more of an amusement than of practical utility—rather a pastime for leisure hours than a serious study, is really an important branch of legal science.

The principle of authority which pervades the common law, and which so often subordinates the claims of logic and natural reason to the sovereignty of "reported cases," demands for its justification a rigorous establishment of the legitimacy of its little hierarchy of decisions. A flaw in their genealogy is fatal to the validity of their pretensions, and renders them as anomalous as was the position of the last royal dynasty in France, between the Legitimists and Republicans,—claiming to belong to both, yet contradicting the fundamental principles of either. To warrant the submission of our judgment before the controlling sway of a decision, we must be informed of the Court which pronounced it, and, what is more, of the authority of the Reporter who has transmitted it to us. For unfortunately there have been many false prophets among us. Many have laid claim to a mission to which they had no proper call. In some cases, from the ignorance or carelessness of the compilers, in some from the injudicious publication, by strangers, of loose notes which were never meant to see the light, quite a large number of the books of reports which appear on the shelves of any respectable law library, are useful only to mislead. In the digests, the cases from such sources are thrown indiscriminately together with those from really authoritative reporters, and no discrimination of the tares from the wheat is made. Any one, therefore, who will sit down and investigate carefully the pretensions of the different Reporters, and fix their respective authority, must confer a great benefit upon the profession.

It is this task which Mr. Wallace proposed to himself in the useful, and at the same time very entertaining volume which is before us. Though it has been long and favorably known, our readers will doubtless thank us for calling their attention to its merits on its reappearance. Possessed of that thorough and accurate learning, which has made his treatise exhaustive and complete, Mr. Wallace is, at the same time, a very clever and graceful writer. Odd as it may sound with regard to a law book, it is really very difficult to put down the "Reporters," when one has once taken it up. It is filled with pleasant gossip and curious information, and casts, in short, upon legal literature all the side-lights which an accomplished gentleman, of very extensive reading, could by any industry obtain. No lawyer, however carefully collected his library, can deem its use safe without a guide such as this.

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OCTOBER, 1855.  
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THE APPROPRIATION OF PAYMENTS.<sup>1</sup>

In this paper we propose to institute some inquiry as to the application of the maxims—*Quicquid solvitur, solvitur in modum solventis*—*Quicquid recipitur, recipitur in modum recipientis*. By way of introduction to our subject, let us, then, investigate generally the nature of a payment.

“*Payment*” denotes the specific performance of an obligation to give a sum of money to another. He to whom the money is owing is called *creditor*; he from whom it is due, *debtor*; and the sum itself, *debt*. The word debt is also used to denote sometimes the debtor’s obligation, and sometimes the correlative right of the creditor. According to the above definition, payment presupposes not only a sum of money due, but a sum of money which is either ascertained in amount, or at least capable of being ascertained by a mere arithmetical process. It is obvious that an obligation to pay an unascertained sum cannot be specifically performed at all; until the amount of the money owing be definitely fixed, an obligation to pay cannot be determined by performance,<sup>2</sup> although it may

<sup>1</sup> From the London Law Magazine for August, 1855, p. 21.

<sup>2</sup> However, when the sum is ascertained, it may be treated as if it had previously been so.

be extinguished by release, or by accord and satisfaction, or in some other way. Again, where there is no obligation there can be no payment, but only a gift, loan, &c.<sup>1</sup> Where a right to a sum of money is determined otherwise than by the actual receipt of that sum, there is likewise no payment, in the proper sense of the word. The right may be extinguished in a mode more or less similar to payment, as by accord and satisfaction, where something other than the sum due is accepted in satisfaction of the right to that sum; or by set-off, where the right to a sum of money is extinguished wholly or partially by an obligation to pay another sum of money to the person from whom the first is due; but these modes of extinguishing a right depend upon principles, and are governed by rules materially different from those applicable to payment.

With reference to the subject-matter of the present inquiry, it may be useful, although scarcely necessary, to remind the reader that the position of a creditor is not, juridically speaking, altered by a refusal to accept in satisfaction of his right, something other than that which is due to him, whilst his position is most materially altered by a refusal to accept payment. Such a refusal is, in point of fact, a refusal to allow the debtor to free himself from an obligation by that which, *ex hypothesi*, is a due performance of it. Refusal to accept a partial payment (sometimes called a payment on account,) is, however, obviously very different from a refusal to accept complete payment, and is by no means attended by the same consequences. It is important to remember this. A creditor who has a right to a sum of 1,000*l.* is not, juridically speaking, prejudiced by a refusal to accept 50*l.* at one time, 100*l.* at another, and the residue at another. The creditor is under no obligation to allow his claim to be satisfied piecemeal, as may best suit the convenience of his debtor, and ought not to be and is not prejudiced by refusing so to do.<sup>2</sup> If, however, he does accept a partial payment, his claim is of course extinguished *pro tanto*. Payment, moreover, only presupposes an obligation on the part of the debtor; set-off, on the

<sup>1</sup> A person who pre-pays is never indebted (*Smith vs. Winter*, 21 L. J. C. P. 158); he anticipates his obligation.

<sup>2</sup> See Domat, *Lois Civiles* iv., tit. 1, § 1, No. 16; and § 4, No. 1.

other hand, presupposes also a counter obligation of like nature on the part of the creditor. Payment is the direct liquidation of a debt due, or treated as due, at the time the payment is made; whilst set-off is the indirect liquidation of a debt by a counter-debt previously or subsequently contracted. Set-off never requires to be more carefully distinguished from payment than when the doctrines relating to the appropriation of payments have to be considered; and especially is it important to bear in mind that payment never creates an obligation, whilst that which gives rise to right to set-off always does.

A payment is said to be "appropriated," or, as continental writers say, "*imputed*," when the obligation of which it is a performance is finally ascertained and settled. If A owes B 100*l.*, and no more, and pays B 100*l.*, there is no room for doubt—the payment is evidently appropriated as soon as it is made, and the debt is extinguished. The only question which in such a case can arise, is, whether the 100*l.* given by A to B, was a payment, or something else,—*e. g.* a gift or a loan: supposing it to be a payment (and the presumption is that way<sup>1</sup>) there can be no question as to what debt it extinguished. But if A owed B several sums of 100*l.*, and made a payment insufficient to liquidate them all, the question would arise, which debt is to be deemed extinguished? and this question is often one of considerable difficulty and importance, as will be obvious by supposing one of the debts to be barred by time, or to be secured, whilst another is unsecured. It is that branch of jurisprudence which determines the mutual rights of debtor and creditor in such cases that we propose to examine.

Those cases<sup>2</sup> in which a person has money in his hands to distribute amongst several claimants, of whom perhaps he is one, do not fall within our province as above determined, although in their discussion the word appropriate is often made use of. They are referred to here, to be excluded hereafter; for if confusion is to be

<sup>1</sup> 1 Tay. Ev. 118; Best on Pres. 176.

<sup>2</sup> Like *Williams vs. Everett*, 14 East, 582; *Kilsby vs. Williams*, 5 B. & A., 815; *Greenwood vs. Taylor*, 14 Sim. 505; which are not cases of payment at all. They belong to that branch of jurisprudence which determines the priority of conflicting rights; or, as German writers say, the concurrence of rights.

avoided, and precision to be attained, the subject for investigation must be clearly defined and limited, and must not be departed from and made to include matters which would never have been thought cognate, had it not been for a verbal ambiguity.

We proceed now to examine the mutual rights of debtor and creditor when a payment is about to be or has been made in respect of debts due from the former to the latter.

*I.—In the first place, then, let us inquire as to the Right of the Debtor.*

When a person is indebted to another on various accounts, the former has the option of paying which he likes first, and is at liberty to appropriate any payment he may make to whichever of the debts he chooses. This doctrine is evidently derived from the Roman law. Ulpian says: "*Quoties quis debitor ex pluribus causis unum debitum solvit, est in arbitrio solventis, quod potius debitum voluerit solutum; et quod dixerit, id erit solutum.*"<sup>1</sup> This rule will be found laid down and acted upon in the cases cited hereafter, and was firmly established in the reign of Elizabeth, as appears from *Anon. Cro. El. 68*, where it was held that, *in spite of the creditor*, a debtor was entitled to have a payment made by him appropriated to the account upon which he expressly made it.<sup>2</sup> The reason for this rule is variously given: Ulpian says:<sup>3</sup>—"*Possumus enim certam legem dicere ei quod solvimus.*" Other writers refer it to the fact that the money actually transferred belongs to the debtor, who can part with what is his own on his own terms, or not at all. It has already been observed, that were the rule otherwise, the law would lend its assistance to the prevention, on the part of the creditor, of the due performance of the obligation to which the debtor is subject; and this is, perhaps, as satisfactory a reason as any.

The rule in question is not, however, one which obtains under all circumstances and at all times: for, first, it does not necessarily apply unless the payment is sufficient completely to extinguish the

<sup>1</sup> Dig. xlv. tit. 8, de Solut. l. 1.

<sup>2</sup> See, too, *Bois vs. Cranfield*, Style, 239; *Chase vs. Box*, Freem. 261.

<sup>3</sup> Dig. ubi sup.



debt on account of which it is made ; and, secondly, it applies only where the debtor appropriates the payment at the time he makes it. These limitations of the rule require further development.

1. A creditor is not prejudiced by refusing to accept a partial payment on account of a larger sum due.<sup>1</sup> If, therefore, he does not choose to accept a partial payment on the account upon which the debtor desires to make it, the creditor is in a position either to decline altogether to take the money, or to insist, if he takes it, upon applying it to the account which best suits himself. If a partial payment is accepted without objection, the inference naturally is that the creditor agrees to apply it to the account to which it was expressly or impliedly appropriated by the debtor, and the money must be treated as appropriated accordingly. But if at the time a partial payment is made, the creditor refuses to accept it unless he is allowed to appropriate it to some particular account, the inference, if the money is left with him, is, that the debtor agreed that the money should be appropriated in accordance with the declared will of the creditor. The rule, therefore, so broadly laid down, *Quidquid solvitur, solvitur in modum solventis*, applies only, 1. Where the sum paid equals all that is due on the account on which it is paid ; or, 2. Where the sum paid (being less than all that is due on the account on which it is paid) is received by the creditor without objection. In other cases the rule which applies is *Quidquid recipitur, recipitur in modum recipientis*.<sup>2</sup>

2. By the law of this country the period within which a debtor can exercise his right of appropriation is very limited ; so limited, that unless exercised at the time of payment his right to appropriate is gone forever. The debtor is not indeed called upon to state expressly upon what account he makes the payment ; that may sufficiently appear from other circumstances. But, notwithstanding an opinion to the contrary, reported to have been expressed by Lord Kenyon at *Nisi Prius*,<sup>3</sup> the law appears to be clearly settled that the right of the debtor to appropriate a payment must

<sup>1</sup> *Dixon vs. Clark*, 5 C. B. 865.

<sup>2</sup> See the judgment in *Webb vs. Weatherly*, 1 Bing. N. C. 505 ; and *Muhlenbruch Lehrb. des Pand. R.* § 470.

<sup>3</sup> *Hammersley vs. Knowlys*, 2 Esp. 666.

be exercised, if at all, at the time the payment is made, and not afterwards.<sup>1</sup>

This rule may be thought extremely harsh, but it must not be forgotten that in the generality of cases payments on account are not equal to what is owing on any account in particular, and that therefore it more commonly occurs than not that the debtor has no right at any time to insist on an appropriation to which his creditor would not assent. In the majority of cases a contrary rule would be extremely prejudicial to the creditor, as it would deprive him of the opportunity of objecting at the fitting time to receive a payment on the account desired by the debtor. And with regard to payments which are not partial, when it is considered that payment of a sum exactly equal to what is due on any particular account goes far to show an appropriation by the debtor to that account, the rule will by no means be found to be so harsh upon the debtor as at first might be supposed. Whether, however, the rule be thought justifiable or not, the cases already cited and those which will be presently referred to, show that it is acted upon with great strictness by English judges.

II. *We will in the next place speak of the Right of the Creditor.* If the debtor when he makes a payment does not appropriate it to any debt in particular, the laws of England<sup>2</sup> and of most countries, agree in conferring a right of appropriation upon the creditor. The extent of this right as well as the time at which it must be exercised, require to be examined.

1. As regards the time at which the creditor can exercise his right, the Roman law<sup>3</sup> expressly declares that he must make the appropriation at the time of payment: *Permittitur ergo creditor constituere, in quod velit solutum, . . . sed constituere in re præsenti, hoc est statim atque solutum est.* This rule, however,

<sup>1</sup> Manning *vs.* Westerne, 2 Vern. 606 ; Wilkinson *vs.* Sterne, 9 Mod. 427 ; Bowes *vs.* Lucas, Andr. 55 ; Hall *vs.* Wood, 14 East, 248, note c ; Peters *vs.* Anderson, 5 Taunt. 596 ; Mayfield *vs.* Wadsley, 3 B. & C. 357.

<sup>2</sup> See Manning *vs.* Westerne, 2 Vern. 607 ; Hall *vs.* Wood, 14 East, 248, note c ; Peters *vs.* Anderson, 5 Taunt. 596 ; Campbell *vs.* Hodgson, Gow. 74.

<sup>3</sup> Dig. xlv. tit. 8, l. 1.

does not prevail in this country.<sup>1</sup> In the well known case of *Peters vs. Anderson*, (5 Taunt. 596,) the creditor was held to have appropriated a general payment by the mode in which he framed his action. In *Simson vs. Ingham*, (2 B. & C. 65,) Best, J., thought the creditor had only a reasonable time; but in the latter case of *Philpott vs. Jones*, (2 A. & E. 41,) it was expressly decided by Lord Denman and the other judges of the Court of Queen's Bench, that the appropriation of a general payment might be made by the creditor *at any time*, at least at any time before action. This decision has been approved by the Court of Common Pleas.<sup>2</sup> Moreover, no appropriation by the creditor is binding until communicated to the debtor;<sup>3</sup> and, therefore, until such communication has been made, a creditor can change his mind as often as he likes. *Simson vs. Ingham*, (2 B. & C. 65,) is the leading authority for this doctrine, and has never been doubted.<sup>4</sup>

Upon the whole, therefore, we conclude that a creditor can exercise his right of appropriation at any time he pleases, but that when once he has, by bringing an action or otherwise, notified to his debtor what appropriation has been made, no different appropriation is allowable.

2. As regards the debt to which the creditor can appropriate a general payment, the Roman law lays down as its fundamental principle, that the creditor must act towards his debtor as he would have the debtor act towards him, if their relative position were reversed;<sup>5</sup> and it is only in cases of comparative indifference to the debtor that the creditor is allowed to make such appropriation as he pleases: *Quoties vero non dicimus id, quod solutum sit, in arbitrio est accipientis, cui potius debito acceptum ferat, dummodo in id constituat solutum, in quod ipse, si deberet, esset soluturus, quoque debito se exoneraturus esset, si deberet . . . . . Æquissimum enim visum est creditorem ita agere rem debitoris, ut suam ageret.*<sup>6</sup>

To what extent this rule was carried is not clear; it could, how-

<sup>1</sup> Quære if it ever did? See the dictum of Tindal, C. J., in *Smith vs. Wigler*, 8 Moore & Sc. 175.

<sup>2</sup> *Mills vs. Fowkes*, 5 Bing. N. C. 455.

<sup>3</sup> *Simson vs. Ingham*, 2 B. & C. 65.

<sup>4</sup> See, too, *Grigg vs. Cocks*, 4 Sim. 438; *ex parte Johnson*, 3 De G. Mc. & G. 218.

<sup>5</sup> Domat iv. 4, § 2.

<sup>6</sup> Dig. xliv. tit. 8, de Solut. l. 1.

ever, only apply where a payment was attempted to be appropriated by the creditor, adversely to the interest of his debtor, and without his knowledge. The rule could not apply if the appropriation were attempted to be made in spite of the wish of the debtor, for, as we have seen, he had the option of making such appropriation as he liked, and the creditor's right could only be exercised *statim atque solutum est*; nor could the rule apply if the debtor, knowing of the appropriation, were silent, for silence under such circumstances, would be deemed consent.

According to the law of our own country, a creditor is by no means bound to make such an appropriation as best suits the convenience of his debtor. The debtor can take care of himself by stating in liquidation of what debt he makes a particular payment; and if he does not either expressly or impliedly exercise this right, the creditor can appropriate a payment to the discharge of whatever debt he pleases;<sup>1</sup> provided, of course, it be owing from the person by or on whose behalf the payment is made. To such an extent is this allowable, that a debt, payment of which cannot be actively enforced, may be liquidated by a creditor in preference to a debt which the creditor could by action be compelled to pay. Thus, if one of two debts be barred by the Statute of Limitations, the creditor is at liberty to appropriate a general payment in liquidation of the barred debt.<sup>2</sup> Moreover, the debts need not be of an equally high nature; whether they are or not is wholly immaterial. In *Peters vs. Anderson*, 5 Taunt. 596, and *Chitty vs. Naish*, 2 Dow. 511, the creditor was allowed to appropriate a general payment to a simple contract debt in preference to a specialty debt,<sup>3</sup> and as, in both instances, the specialty was the older of the two debts, the same cases are authorities to show that the creditor's

<sup>1</sup> See, in addition to the cases presently referred to, *Campbell vs. Hodgson*, Gow, 74; *Morgan vs. Jones*, 1 Bro. P. C. 32.

<sup>2</sup> *Mills vs. Fowkes*, 5 Bing. N. C. 455; *Williams vs. Griffiths*, 5 M. & W. 800; *Nash vs. Hodgson*, Kay, 650. Such an appropriation cannot, however, be deemed an admission by the debtor that the barred debt is due, and consequently does not take the debt out of the statute. See, too, the case of *Philpott vs. Jones*, 2 A. & E. 41, and *post*.

<sup>3</sup> See, too, *Chase vs. Cox*, Freem. 261; *Brazier vs. Bryant*, 2 Dowl. 477, *contra* Vin. Ab. Paym. M. 9.

right of appropriation is independent of the relative ages of his demands.<sup>1</sup>

The creditor's right prevails even as against a surety: for if a person has two demands against the same debtor, and one of them is secured by a surety, a payment made generally by the principal debtor may be applied by the creditor to the liquidation of the other demand,<sup>2</sup> for which the surety is not liable; and, consequently, the surety may then be sued for the whole of the debt for which he is responsible, less, of course, the excess, if any, of the sum paid, over and above the debt to which the payment has been applied by the creditor. The surety cannot effectually urge that the debtor must be presumed to have performed his obligation to him by paying off the guaranteed debt rather than some other.<sup>3</sup>

In conformity with the rule of the civil law, it was indeed held, in an old case (*Heyward vs. Lomax*, 1 Vern. 23,) that a creditor could not appropriate a general payment to the discharge of a debt not bearing interest in preference to a debt on which interest was running, "because it is natural to suppose that a man would rather elect to pay off the money for which interest was to be paid, than the money due on account for which no interest is payable." Notwithstanding this natural supposition, the cases already referred to show conclusively, that the creditor is not called upon to consult his debtor's interest. *Heyward vs. Lomax*, moreover, is directly opposed to what was held by the Lord Keeper in *Chase vs. Box*, (Freem. 261,)<sup>4</sup> and is in principle also opposed to all the modern cases, in which the creditor's right to appropriate has been upheld.

<sup>1</sup> In *Wentworth vs. Manning*, 2 Eq. Ab. 261, this proposition appears not to have been admitted.

<sup>2</sup> *Ex parte Whitworth*, 2 Mont. Deac. & De G. 164; *Kirby vs. Duke of Marlborough*, 2 M. & S. 18; *Plomer vs. Long*, 1 Stark. 155; *Perris vs. Roberts*, 1 Vern. 84; and *Marryatts vs. White*, 2 Stark. N. P. 101, are not opposed to this. Nor is *Parr vs. Howlin*, 1 Alc. & Nap. 196.

<sup>3</sup> In *ex parte Whitworth*, 2 Mont. Deac. & De G. 164, Sir J. Cross seems to have thought that the doctrines of appropriation applied only as between the debtor and creditor; and that when the interests of other persons were concerned, different principles ought to be resorted to. This view has not, however, been taken by other judges.

<sup>4</sup> See, too, *Manning vs. Westerne*, 2 Vern. 606.

The case of *Heyward vs. Lomax*, it is therefore submitted, cannot now be considered as law.

Having thus stated and illustrated the general principle according to which the creditor can make such an appropriation of a general payment as best suits his own convenience, it is necessary to examine the real and apparent exceptions to the rule.

*First.*—The rule presupposes that the debtor has not himself appropriated the payment.<sup>1</sup> Those cases, therefore, where an actual appropriation by him is presumed or inferred, and where, consequently, a different appropriation by the creditor cannot be allowed, are excluded from the operation of the rule, but are not, properly speaking, exceptions to it. Instances of presumed appropriation are afforded by the cases of *Meggot vs. Wilson*, 1 Lord Raym. 286, and *Dawe vs. Holdsworth*, Peake, N. P. ca. 64, where Lord Holt, and Lord Kenyon on his authority, held that if two debts are owing by a person, and he could be made bankrupt in respect of one of them, but not in respect of the other, a payment made by him generally is to be deemed to have been made in liquidation of the former, and not of the latter debt. By this, all that is meant appears to be, that there is a presumption of appropriation by the debtor, and that such presumption is not rebutted by proof that there was not, in fact, any *express* appropriation. It must be remembered that in Lord Holt's time, bankruptcy was regarded as little short of a crime, and the presumption alluded to was a presumption in favor of innocence.<sup>2</sup>

The cases of *Meggot vs. Mills*, *Heyward vs. Lomax*, and some others, certainly show that our judges were formerly much more inclined than now, to protect the debtor from a prejudicial appropriation by his creditor. The lenient doctrine of the civil law was evidently that tacitly adopted in the early stages of our commercial law; but it has as evidently long been disregarded.

Instances where a payment made generally may nevertheless be inferred to have been made on some particular account, and so, in

<sup>1</sup> In cases not falling within the classes next noticed in the text, an intention on the part of the debtor to appropriate his payment, goes for nothing if it is not communicated to the creditor; *Manning vs. Westerne*, 2 Vern. 605.

<sup>2</sup> See the observations of the Court on these two cases, in 5 Taunt. 602.

fact, to have been appropriated by the debtor, may easily be imagined ; many such cases are to be found in the books,<sup>1</sup> and from them several secondary rules of considerable importance may be deduced. These rules, however, being founded on inference, are inapplicable where the inference on which they are based is excluded by surrounding circumstances. Moreover, each case turning on its own peculiar facts, it is impossible, after forming groups of cases, to abstract any characters common to all the groups, except these, viz : absence of express appropriation by the debtor, and presence of circumstances which nevertheless justify an inference of appropriation by him. Premising that the cases already referred to show conclusively that from the mere fact that appropriation in one way would be most to the advantage of the debtor, no appropriation in that way is inferred to have been made by him, we proceed to examine those cases in which appropriation by the debtor has been inferred.

1. One of the earliest rules laid down was, that where a principal sum is due, and interest upon it is in arrear, a general payment is to be deemed to have been made in liquidation of the arrears of interest, and not of the principal.<sup>2</sup> As compound interest was not allowed, this inference was evidently to the disadvantage of the debtor. The rule, however, is reasonable, inasmuch as no creditor would think of accepting a sum in part-payment of a principal, until the interest upon it had been liquidated.

2. When the money received by the creditor arises from the sale of a security given for a particular debt, the money is ordinarily to be treated as a payment on account of the same debt.<sup>3</sup>

3. When money is handed over by a debtor to his creditor, such money is inferred to be a payment on account of then existing liquidated debts, and not to be a deposit to secure future debts ; and the creditor is not therefore allowed to appropriate such money

<sup>1</sup> See, in addition to the cases cited hereafter, *Shaw vs. Picton*, 4 B. & C. 715 ; *Perris vs. Roberts*, 2 Vern. 34 ; *Marryatts vs. White*, 2 Stark. N. P. 101.

<sup>2</sup> Vin. Ab. Paym. M. 4 ; *Haynes vs. Harrison*, 1 Ch. Ca. 105 ; *Chase vs. Box*, Freem. 261 ; *Bostock vs. Bostock*, 8 Mod. 242 ; *Bower vs. Marris*, Cr. and Ph. 351.

<sup>3</sup> *Brett vs. Marsh*, 1 Vern. 468 ; *Young vs. English*, 7 Beav. 10. *Newmarsh vs. Clay*, 14 East, 239, was decided upon a similar principle.



except to debts owing to him at the time he received it. The only authority for the latter part of this rule appears to be the case of *Hammersly vs. Knowlys*, 2 Esp. 666. The case, as reported, is not very clear; it seems, however, to have been one of banker and customer, and that the latter, being indebted to the former, made a general payment on account, and then became further indebted. The banker, upon the subsequent insolvency of the customer, sued a third person upon accommodation acceptances, which had been given to the banker as a security for the first contracted debt; the defendant insisted that that debt had been paid, whilst the banker contended that he had a right to appropriate the payment, which had been made generally, to the discharge of the subsequently contracted debt. This, however, Lord Kenyon would not allow, on the ground that it would be too much to say that a payment made generally was not a payment, but a deposit.<sup>1</sup> Upon a similar principle, a payment made generally was held to be applicable only to a debt ascertained in amount, and not to a debt the amount of which was wholly uncertain, and could only be determined by taking a partnership account.<sup>2</sup> Both these cases are founded upon the rule that money received by a debtor from his creditor is *prima facie* a payment in the proper sense of that word.

Here it may be as well to direct attention to a distinction between the appropriation of a payment and the appropriation of a security or its proceeds. It has just been seen that the creditor cannot convert a payment of an existing debt into a security for a future debt, and cannot therefore appropriate a payment, although made generally, to a debt contracted after the payment was made. But it has been held that, on the bankruptcy of a debtor, his creditor can apply any general securities in his hands, or the proceeds of such securities, in whatever manner best suits his own purpose, and even to claims which have arisen after the securities were given. This doctrine was settled by Lord Eldon, in *ex parte Hunter*, 6 Ves. 94;<sup>3</sup> and was acted upon in the late case of *ex parte Johnson*, 3 De

<sup>1</sup> It must not be concealed that there was here only a single current account, in which the debt in dispute appeared as an early item.

<sup>2</sup> *Goddart vs. Hodges*, 1 Cr. & M. 33.

<sup>3</sup> See, too, 1 Cooke's Bankr. Laws, 4th ed. 120.

G. Mc. & G. 218.) It often enables a creditor to avail himself of a security, by applying it to an unliquidated claim which he could not prove against the bankrupt's estate, and then to prove for a debt, without setting off against it the value of the security. The principle of the cases just cited seems to be satisfactory. On the one hand, the creditor has several claims against the bankrupt; and, on the other hand, the latter has a claim against the creditor in respect of the securities held by him. These cross-claims more or less neutralize each other; the difference between the value of the securities held by the creditor, and the sums owing to him, determines which of the two parties is upon the whole the debtor of the other; and until the balance is struck, *i. e.* until the creditor has been allowed to set off *all* his claims against the value of his securities, he cannot be said to be indebted to the bankrupt's estate. The doctrine arises from the application of the liberal principle, "he who will have equity must do equity," and from the non-application in bankruptcy of the absurdly strict legal rules concerning set-off. The above reasoning is obviously inapplicable to cases of appropriation of *payments*, inasmuch as a payment is in discharge of an obligation on the part of the debtor, and gives him no claim against the creditor; cross-claims do not, in fact, arise.

4. Where a person is indebted in two capacities, *e. g.* on his own account and also as the representative of another, a general payment is, in the absence of evidence to the contrary, inferred to have been made in discharge of the liabilities incurred by the payer himself, and the creditor is not therefore at liberty to appropriate such a payment to the discharge of a liability of the other class. This was settled by the case of *Goddart vs. Cox*, 2 Str. 1194. There the debtor was liable—1. For a debt contracted by himself; 2. For a debt contracted by his wife, *dum sola*; 3. For a debt owing by her as executrix. C. J. Lee held that the defendant having paid money to the plaintiff generally on account, the plaintiff was entitled to ascribe such payments either to the first or the second debt, but not to the third. Of course, circumstances may exist which show that the payment was not made in discharge of the private liability of the payer. Thus, in *Thompson vs. Brown*,

Moo. & M. 40, a payment made with partnership money to a person who was a creditor both of the firm and of the individual partner making the payment, was naturally imputed to a partnership debt. So in *Bowes vs. Lucas*, Andr. 55, a general payment of rent by a person owing rent as executor and also as assignee, was held to have been made by him as executor; the form of the receipts warranting such an inference.<sup>1</sup>

5. Another and most important instance of inferred appropriation by the debtor is afforded by those cases where there is only one single open current account between the debtor and his creditor. In such cases, a payment made generally on account, is, in the absence of evidence to the contrary,<sup>2</sup> deemed to be made in satisfaction of the *earliest items* in the account; and the creditor is consequently not allowed to make any other appropriation, unless he can show some special reason justifying him in so doing. This doctrine was firmly established by Sir William Grant in *Clayton's case*, 1 Mer. 585, which is the leading authority upon the point, and the judgment in which deserves a most careful perusal. *Bodenham vs. Purchas*, 2 B. & A. 39, and many other cases, have since been decided upon the same principle.<sup>3</sup> In *Williams vs. Rawlinson*, 3 Bing. 71, the doctrine in question was held to apply even to the prejudice of the debtor's surety, who in vain contended that a general payment ought to be appropriated to the debt which he had guaranteed; and in the late important case of *Pennell vs. Deffell*, 4 De G. Mc. and G. 372, the rule was further adhered to, although persons for whom the debtor was trustee were thereby deprived of a considerable sum of money. In *Pennell vs. Deffell*, *cestuis que trustent* attempted to follow their money into the hands of the bankers of their trustee: the money was traced to the bankers, was found on the credit side of the trustee's account at the bank, and was held, according to the rule in *Clayton's case*, to have disappeared so far, but so far only, as the payments out by the banker had diminished it after having exhausted all the sums previously paid in. The L. J. Turner, in his judgment says,—“I take it to be

<sup>1</sup> See, too, *Sternedale vs. Hankinson*, 1 Sim. 393.

<sup>2</sup> 4 B. & Ad. 466-467, and see *post*.

<sup>3</sup> See the Synopsis of cases, *post*.

now well settled, that moneys drawn out on a banking account are to be applied to the earlier items on the opposite side of the account. By every payment which he makes, the banker discharges so much of the debt which he first contracted. If that debt arose from trust-moneys paid in by the customer, so much of those trust-moneys is paid off, and unless otherwise invested on account of the trust, falls into the customer's general estate, and is lost to the trust, because it cannot be distinguished from the general estate of which it has become part. If, on the other hand, the earliest debt due from the banker arose from the customer's own moneys paid in by him, that debt is *pro tanto* discharged, and the trust-moneys subsequently paid in remain unaffected. The same principle runs through the whole account: each sum drawn out goes to discharge the earliest debt due from the banker which is remaining unpaid; and thus, when it is ascertained what moneys have been paid in belonging to the trust, it becomes clear to what portion of the balance which remains the trust estate is entitled."

The rule in Clayton's case, it will be observed, obtains only upon the supposition that there is no evidence from the usual course of business or otherwise, to show in discharge of what particular item a payment was made. The rule is by no means one which, like a *presumptio juris et de jure*, is applied rigorously and independently of intention.<sup>1</sup> In the following cases, although there was a single open current account, there was evidence to show in respect of what in particular a general payment was made, and the rule in Clayton's case was consequently not applied. See *Stoveld vs. Eade*, 4 Bing. 154; *Taylor vs. Kymer*, 3 B. & Ad. 320; *Lysaght vs. Walker*, 5 Bli. N. S. 1.

In applying the rule in Clayton's case, the right of a creditor to refuse a partial payment must not be forgotten. If the creditor accepts a partial payment without dissent, he is, as already observed, bound to apply it for the purpose for which it is paid, and whether that purpose be expressed or implied, is immaterial. If, then, there be a single current account between a debtor and his creditor, and a general partial payment be made and accepted without objection,

<sup>1</sup> See 4 B. & Ad. 766-767, *Wilson vs. Hirst*.

the rule in Clayton's case applies, and the creditor cannot afterwards make a different appropriation. But if the creditor refuses to accept a partial payment unless it be applied to the liquidation of some particular debt, and if, after such a refusal, the money is left with him, the inference would be that the debtor acquiesced in making the payment on the account desired, and Clayton's case would not apply. These remarks appeared necessary in order to reconcile the observations of Lord Lyndhurst, in *Pemberton vs. Oakes*, 4 Russ. 154, and of Tindal, C. J., in *Smith vs. Wigler*, 3 Moore & Scott, 175, with the view above taken of Clayton's case. Both those learned judges observe that the rule laid down by Sir William Grant only applies if there has been no express appropriation by the debtor *or the creditor*; and as we have already seen that the creditor is not bound to make an appropriation within any fixed time, it might have been thought the rule in Clayton's case would scarcely ever be applicable, or that, being founded on an appropriation by the debtor, it ought to obtain in spite of the creditor. Clayton's case and the rule established by it depend, however, upon a presumption: "presumably it is the first sum paid in that is the first drawn out;" in other words, a payment in respect of one entire current account is inferred to have been made by the debtor in liquidation of the earliest items to his debit. But this inference would be rebutted, and the rule would not therefore apply, if at the time when a partial payment was made, the creditor insisted on having it applied to some item in particular.

Such cases as *Pease vs. Hirst*, 10 B. & C. 122, and *Henniker vs. Wigg*, 4 Q. B. 793, although sometimes referred to as instances where the rule in Clayton's case has not been applied, in truth illustrate a different branch of the law. In each of these two cases the question was, whether a certain security was or not at an end, as it would have been by the rule in Clayton's case, if it had been given in respect of the earliest of several debts. The Court held that the securities were given not for any debt in particular, but generally as continuing securities for any balance which might be due, and that therefore Clayton's case did not apply *so as to extinguish*

*the securities.* These decisions are evidently foreign to the matter in hand.

6. The last class of cases in which a general payment is inferred to have been made on account of some particular debt, consists of those where a debtor, being in insolvent circumstances, his assignees or trustees make a payment of so much in the pound to every creditor. If a creditor has several demands and receives so much in the pound upon the total amount of his claims, what he receives is considered as paid as much in respect of one debt as of another, and he therefore cannot appropriate the dividend received, to the satisfaction of one debt more than of another, but must apply the whole dividend to all the debts *pro rata*.<sup>1</sup> Consequently, also, if one of the debts is secured by a surety, the surety cannot insist upon the whole dividend being applied by the creditor in satisfaction of that debt, nor can the creditor apply the whole dividend to an unsecured debt; the dividend must be apportioned ratably between the two, and the surety is answerable, and answerable only for the amount of the debt guaranteed less the dividend paid in respect of it.<sup>1</sup> The same rule of appropriation *pro rata* applies of course where, in the absence of insolvency, it can be gathered from the conduct of the parties that a general payment was intended as a payment on account of each debt. Such was the case of *Perris vs. Roberts*, 1 Vern. 34, *aliter*, *Bevis vs. Roberts*, 2 Ch. Ca. 83, where two debts had been cast into one account, and a bill of sale given in respect of the amount of both had been realized by the creditor. The Master of the Rolls and the Lord Chancellor both, held that a surety for one of the debts was entitled to have the proceeds of the bill of sale applied ratably to both, and that the creditor had no right as against the surety, to apply the whole proceeds to the discharge of the debt for which he was not responsible. We may, perhaps, be allowed to express a doubt whether the conclusion in this case would not have been different if it had occurred a century or so later. The case furnishes another

<sup>1</sup> See *Bardwell vs. Lydall*, 7 Bing. 489; *Raikes vs. Todd*, 8 A. & E. 846. But arrears of interest are to be discharged before any part of the principal. *Bower vs. Marris*, Cr. & Ph. 351.

example of the influence of the Roman law at the period of the decision.

*Secondly.*—The extensive right of appropriation which the law confers upon creditors, presupposes the existence of more than one valid debt. We have already seen that the creditor may appropriate a general payment to a debt barred by time ; but the statute of James, upon which the cases deciding this doctrine turned has often been declared only to bar the remedy by action or suit, and not to extinguish the right to payment, if there be any other mode of enforcing it. Where, however, one of the so called debts has no juridical existence, where it imposes no obligation on the debtor, and consequently confers no right on the creditor, there the creditor cannot be allowed to apply a general payment to its liquidation ;<sup>1</sup> to allow him to do so would be at the same time to admit and deny the existence of one and the same right.

Upon this principle, accordingly, it was held in *Wright vs. Laing*, 3 B. & C. 165, that the creditor could not appropriate a general payment to the liquidation of a claim invalid on the ground of usury. So in *Lampbell vs. Billericay Union*, 3 Exch. 383, it was held that a creditor could not appropriate a general payment to the liquidation of a demand arising from work done for a corporation, but for which work the corporation could not be called upon to pay, there having been no contract under the corporate seal.<sup>2</sup> These cases have been supposed irreconcilable with *Philpott vs. Jones*, 2 A. & E. 41. There, a publican was allowed to appropriate a general payment to the liquidation of a debt owing for spirits sold in smaller quantities than those for which a person is allowed by the Tippling Act to sue. But the Tippling Act merely says, that *no person shall sue for or recover*, either in law or equity, any debt for spirituous liquors, unless the debt is contracted at one time to the amount of twenty shillings or upwards. In this respect the Tippling Act resembles the statute of James for the limitation of actions and suits ; both statutes deprive a creditor of active judicial assistance,

<sup>1</sup> *Ex parte Randleson*, 2 Deac. & Ch. 534.

<sup>2</sup> This case is, however, directly opposed to *Arnold vs. Poole*, 4 Man. & Gr. 860, and is one of the many disgraceful modern cases in which corporations have been allowed to take advantage of their own wrong.



but both allow him to assist himself if he can. *Philpotts vs. Jones* is clearly, therefore, not an authority for the statement that a person can appropriate to the satisfaction of a juridically non-existing debt, money which has been paid him generally on account. *Crookshank vs. Rose*, 5 Car. & P. 19, is another case on the Tippling Act, and is equally open to the above remarks.

As, until recently, an equitable obligation was not recognized at law, it was held in *Birch vs. Tebbutt*, 2 Stark. N. P. 74, and by Bayley, B., in *Goddart vs. Hodges*, 1 Cr. & M. 33, that a creditor could not be permitted by a Court of law to apply a general payment to the liquidation of a demand purely equitable. Even admitting that these cases were decided by a strictly logical application of the rule in question, the decisions may be regretted as adding to the number of cases in which law and equity conflict. Now, however, that equitable rights and obligations are not ignored at law, a different doctrine will no doubt be established. *Bosanquet vs. Wray*, 6 Taunt. 597, which is sometimes thought opposed to the last two cases, fell within the rule of Clayton's case, as the equitable debts formed the earliest items of what the Court held to be a single current account. The marginal note by Taunton has probably led to the opinion noticed, and is certainly calculated to mislead.

*James vs. Child*, 2 Cr. & J. 678, although not falling strictly within the principle now under discussion, seems to be more closely allied to the cases just referred to than to any others. There the Court held that a solicitor having an open unsettled account with his client, had no right to make two bills, putting all the taxable items in one, and all the non-taxable items in the other, and then to apply a general payment to the liquidation of the first bill in order to sue solely on the second. The client had a right to have all the items in one bill, and to refer the whole for taxation.

*Thirdly.*—The general right of the creditor, which has been examined, is a right to appropriate a payment which the debtor might have appropriated if he had thought proper, but which he did not, in fact, either expressly or impliedly, or by presumption, pay on any account in particular. The creditor's right does not arise unless the debtor had an opportunity to exercise his right;

and, consequently, in *Waller vs. Lacy*, 2 Man. & Gr. 54, the Court would not suffer an attorney to appropriate in part satisfaction of his bill a sum of 17*l.* which he had received from a debtor of the defendant, but without his knowledge. Tindal, C. J., there said, "It is not disputed that as regards a payment where the party paying does not appropriate the money, the party receiving it may; for it is the fault of the payer if he omit to exercise the right of appropriation of the sum so paid. But this is not the case of a payment at all, but of a sum of money received without the knowledge of the defendant. Therefore, as the latter never had the power of exercising any election as to the application of this sum, the right of the plaintiff to appropriate it never arose." Upon a similar principle it is held, that the produce of a security must be applied to liquidate the debts for which that security was expressly given, and no others,<sup>1</sup> and they must be liquidated according to their priority; the produce of the security being, in fact, treated as the security itself.<sup>2</sup>

Having now passed in review all the cases of any importance relating to the appropriation of payments as defined at the beginning of this inquiry, it may be useful concisely to recapitulate the principal rules deducible therefrom.

Using the word debt to denote a sum of money owing by one person to another, and the amount of which is either ascertained or ascertainable by mere computation; and using the word payment to denote the transfer of a sum of money by a debtor to his creditor, in complete or partial satisfaction of the latter's claims against him; it appears that by the law of this country:

1. A debtor may pay in full whichever of several debts he likes; and if, when he makes a payment in full, he states on account of what debt he makes it, the payment can be applied to that debt and no other.

2. A creditor has a right to insist upon applying a partial payment to any debt he pleases; but if, when the partial payment is

<sup>1</sup> Subject to the doctrine of tacking.

<sup>2</sup> *Brett vs. Marsh*, 1 Vern. 468; and see *Greenwood vs. Taylor*, 14 Sim. 505; *Young vs. English*, 7 Beav. 10.

made, he accepts it without objection, the payment must be applied to that debt on account of which the debtor made it.

3. A payment which is not, when made, appropriated to any debt in particular, may at any time be applied by the creditor to any debt existing at the time of payment; and no appropriation by him is considered final until communicated to the debtor.

4. In the absence of sufficient reason to the contrary, a payment is inferred to have been, and is to be treated as having been appropriated, when made, to the discharge, in the first instance,—

Of the debt for which the debtor is responsible in his own private capacity;

Of a debt then due, rather than of an unascertained sum claimed by the creditor, or of a debt not then payable;

Of a debt upon which the debtor might then have been made bankrupt;

Of the then arrears of interest;

Of the earliest of several items which together form one entire account;

Of all debts *pro rata* when the payment is a dividend of so much in the pound.

Further, it may be gathered from the decided cases, that the right of the creditor is a right which, if it arises at all, is wholly independent of the will of the debtor, and cannot be considered as a permission or license granted by him; for if it were, it would lead to the absurdity of inferring a tacit license to do that which is most disadvantageous to the person supposed to grant it, and would further lead to a doctrine which is clearly not law,<sup>1</sup> viz: that an appropriation by the creditor of a general payment would be sufficient to take the debt to which the appropriation is made, out of the Statute of Limitations. Nor do the cases warrant the notion that, under certain circumstances, *the law* appropriates a general payment to one debt rather than another; and still less is it true, that the law appropriates such a payment in the way most beneficial to the debtor, or according to the justice and equity of the case. The law, in this country, it is submitted, makes no appropriation

<sup>1</sup> Nash *vs.* Hodgson, Kay, 650.

whatever, and the appropriations said to be made by it are neither more nor less than the appropriations made by the debtor, and evidenced, not indeed by his express words, but by circumstances which leave but little doubt as to what his intention really was.

NOTE.—The following SYNOPSIS OF CASES relative to the appropriation of payments, is submitted as likely to prove useful to the practitioner, and as affording means for attesting the accuracy of some of the propositions and suggestions contained in the foregoing pages :

### I.—RIGHT OF THE DEBTOR—

*To appropriate in the first instance.*

Anon., Cro. El. 68 ; Bois *vs.* Cranfield, Style, 289 ; Chase *vs.* Box, Freem. 261.

*To appropriate at the time of payment, but not afterwards.*

Manning *vs.* Westerne, 2 Vern. 606 ; Wilkinson *vs.* Sterne, 9 Mod. 427 ; Bowes *vs.* Lucas, Andr. 55 ; Hall *vs.* Wood, 14 East, 243, note c. ; Peters *vs.* Anderson, 5 Taunt. 596 ; Mayfield *vs.* Wadsley, 3 B. & C. 357.

### II.—RIGHT OF THE CREDITOR—

*To appropriate a general payment.*

Manning *vs.* Westerne, 2 Vern. 607 ; Hall *vs.* Wood, 14 East, 243, note c. Peters *vs.* Anderson, 5 Taunt. 596 ; Campbell *vs.* Hodgson, Gow, 74 ; Morgan *vs.* Jones, 1 Bro. Parl. Ca. 32.

*To appropriate at any time he likes.*

Peters *vs.* Anderson, 5 Taunt. 596 ; Philpotts *vs.* Jones, 2 A. & E. 41 ; Mills *vs.* Fowkes, 5 Bing N. C. 455.

*To change his mind as often as he likes, until the appropriation is communicated to the debtor.*

Simson *vs.* Ingham, 2 B. & C. 65 ; Grigg *vs.* Cocks, 4 Sim. 438. [And see *Ex parte* Johnson, 3 De G. Mc. & G. 218.]

*And to appropriate to any debt he pleases, e. g.*

1. To a debt, payment of which cannot be actively enforced, because of—

The Statutes of Limitations.

Mills *vs.* Fowkes, 5 Bing. N. C. 455 ; Williams *vs.* Griffiths, 5 M. & W. 800 ; Nash *vs.* Hodgson, Kay, 650.

The Stamp Act.

Biggs *vs.* Dwight, 1 Man. & Ry. 308.

The Tippling Act.

Philpotts *vs.* Jones, 2 A. & E. 41 ; Crookshanks *vs.* Rose, 5 C. & P. 19

## 2. To a simple contract rather than to a specialty debt.

*Peters vs. Anderson*, 5 Taunt. 596; *Chitty vs. Naish*, 2 Dowl. 511; *Chase vs. Cox*, Freem. 261; *Brazier vs. Bryant*, 2 Dowl. 477. [But see *Vin. Ab. Paym. M. 9.*]

## 3. To a new rather than an old debt.

*Peters vs. Anderson*, 5 Taunt. 596; *Chitty vs. Naish*, 2 Dowl. 511 [But see *Wentworth vs. Manning*, 2 Eq. Ab. 261.]

## 4. To a debt not guaranteed, rather than to one which is.

*Ex parte Whitworth*, 2 Mont. Deac. & De G. 164; *Kirby vs. Duke of Marlborough*, 2 M. & S. 18; *Plomer vs. Long*, 1 Stark, N. P. 155.

## 5. To a debt not bearing interest, rather than to one which does.

*Chase vs. Cox*, Freem. 261; *Manning vs. Westernne*, 2 Vern. 606; [Heyward *vs. Lomax*, 1 Vern. 23, *contra.*]

*Provided it be a debt of which the law can take notice.*

*Ex parte Randleson*, 2 Deac. & Ch. 534; *Wright vs. Laing*, 3 B. & C. 165; *Lampbell vs. Billaricay Union*, 3 Exch. 283.

[As to Equitable debts, see

*Birch vs. Tebbutt*, 2 Stark. N. P. 74; *Goddart vs. Hodges*, 1 Cr. & M. 33.]

*And be existing at the time the payment is made.*

*Hammersley vs. Knowlys*, 2 Esp. 666.

*And be also then ascertained in amount.*

*Goddart vs. Hodges*, 1 Cr. & M. 33.

*And provided the debtor had an opportunity of appropriating.*

*Waller vs. Lacy*, 2 Man. & Gr. 54; *Brett vs. Marsh*, 1 Vern. 468; *Young vs. English*, 7 Beav. 10.

### III.—CASES WHERE NO APPROPRIATION HAVING BEEN EXPRESSLY MADE BY THE DEBTOR, AN APPROPRIATION BY HIM IS INFERRED, UNTIL SOME REASON APPEARS TO THE CONTRARY.

*Inferences drawn from the nature of the debts, viz: of appropriation to—*

## 1. Debt on which the debtor could be made bankrupt.

*Meggot vs. Wilson*, 1 Ld. Raym. 286; *Dawe vs. Holdsworth*, Peake, N. P. 64.

## 2. Arrears of Interest.

*Vin. Ab. Paym. M. 4*; *Haynes vs. Harrison*, 1 Ch. Ca. 105; *Chase vs. Box*, Freem. 261; *Bostock vs. Bostock*, 8 Mod. 242; *O'Bierne vs. McMahon*, 1 Jones, (Jr. Eq.) 442; *Bower vs. Marris*, Cr. & Ph. 351.

## 3. Existing debt.

*Hammersley vs. Knowlys*, 2 Esp. 666.

## 4. Debt owing by the debtor in his own private capacity.

Goddart *vs.* Cox, 2 Str. 1194.

## 5. Earliest item of current account.

Clayton's ca. 1 Mer. 585; Bodenham *vs.* Purchas, 2 B. & A. 39; Simson *vs.* Cook, 1 Bing. 452; Williams *vs.* Rawlinson, 8 Bing. 71; Field *vs.* Carr, 5 Bing. 13; Brooke *vs.* Enderby, 2 Brod. & Bing. 70; Pemberton *vs.* Oakes, 4 Russ. 154; and compare Jones *vs.* Maund, 3 Y. & C. Ex. 154. Copland *vs.* Toulmin, 7 Cl. & Fin. 349; Bank of Scotland *vs.* Christie, 8 Cl. & Fin. 227, 228; Smith *vs.* Wigler, 3 Moo. & Sc. 175; Manning *vs.* Westerne, 2 Vern. 606; *Ex parte* Randleson, 2 Deac. & Ch. 534; Sterne-  
dale *vs.* Hankinson, 1 Sim. 393; Pennell *vs.* Deffell, 3 De G. Mc. & G. 372.

*Inferences drawn from the mode of payment or circumstances attending it; viz: from—*

1. A payment *pro ratâ* of so much in the pound.

Bardwell *vs.* Lydall, 7 Bing. 489; Martin *vs.* Brecknell, 2 M. & S. 39; Raikes *vs.* Todd, 8 A. & E. 846; Paley *vs.* Field, 12 Ves. 435; Bower *vs.* Marris, Cr. & Ph. 351 [as to interest.]

## 2. Pressure.

Shaw *vs.* Picton, 4 B. & C. 715.

## 3. Substitution for security (see, too, below, No. 7.)

Newmarsh *vs.* Clay, 14 East, 239.

## 4. Account stated.

Perris *vs.* Roberts, 2 Vern. 34.

## 5. Amount of payment and discount.

Marryatts *vs.* White, 2 Stark. N. P. 101.

## 6. Form of receipt.

Bowes *vs.* Lucas, Andr. 55; Frazer *vs.* Birch, 3 Knapp, 380.

## 7. Source of money.

Brett *vs.* Marsh, 1 Vern. 468; Thompson *vs.* Brown, Moo. & M. 40; Stoveld *vs.* Eade, 4 Bing. 154; Young *vs.* English, 7 Beav. 10; Greenwood *vs.* Taylor, 14 Sim. 505.

## 8. Course of business.

Brown *vs.* Anderson, 2 Moo. Priv. Counc. 245; Taylor *vs.* Kymer, 3 B. & Ad. 320; Lysaght *vs.* Walker, 5 Bli. N. S. 1.

## RECENT AMERICAN DECISIONS.

*In the District Court of the United States, Eastern District of Pennsylvania.*

UNITED STATES *ex rel.* JOHN H. WHEELER vs. PASSMORE WILLIAMSON.

1. Where the defendant in a *habeas corpus* makes an evasive or false return thereto, he may be committed for a contempt, in order to compel obedience to the writ.
2. The return to a *habeas corpus*, denying that the persons for whose benefit the writ is issued, are in the defendant's "custody, possession, power, or control," may be traversed and proved false on the hearing.
3. In a case where the relator and the defendant were citizens of different states, a Court of the United States granted a *habeas corpus*, the alleged detainer being without any authority of law, and of a purely civil nature.
4. The writ of *habeas corpus* may be issued on the petition of a master, whose slaves have been taken and detained from him by force.
5. It is not material in such case that the abduction of the slaves from their master has taken place while the master was in bona fide transit over the soil of a state whose laws prohibit the institution of slavery. Even if the slaves thereby became free, it would not justify their forcible removal, without authority of law, and against their consent and that of their master.

On the 18th day of July last the Hon. John H. Wheeler, U. S. Minister to Nicaragua, made application to the United States Court for this District for a writ of *habeas corpus*, to be directed to one Passmore Williamson. The petition of Mr. Wheeler, verified by affidavit, was presented by his counsel, Mr. J. C. Vandyke, District Attorney of the United States.

The Court allowed the writ, which was made returnable forthwith, and a hearing appointed for the following day, (the 19th) at three o'clock in the afternoon.

On the 19th, no return being made, and it appearing that the party to whom it was directed was absent from the city, Mr. Wheeler's counsel applied for an alias writ, which was allowed, and made returnable on the following morning at 10 o'clock.

On the following morning, Williamson appeared in Court, attended by his counsel, Messrs. Hopper, Gilpin and Birney, and the following return was drawn up in the presence of the Court.



“To the Hon. John K. Kane, the Judge within named.

“Passmore Williamson, the defendant in the within writ mentioned, for return thereto, respectfully submits, that the within named Jane, Daniel and Isaiah, or by whatever names they may be called, nor either of them, are not now, nor was at the time of the issuing of the said writ, or the original writ, or at any other time, in the custody, power or possession of, nor confined, nor restrained their liberty by him the said Passmore Williamson. Therefore he cannot have the bodies of the said Jane, Daniel and Isaiah, or either of them, before your honor, as by the within writ he is commanded.

“P. WILLIAMSON.

“The above named Passmore Williamson being duly affirmed, says, that the facts in the above return set forth are true.

“P. WILLIAMSON.

“Affirmed and subscribed before me this 20th day of July, A. D. 1855.

“CHAS. F. HEAZLITT,

“*U. S. Commissioner.*”

Mr. VANDYKE briefly stated the facts of the case, and asked leave to traverse the return. The facts appear in the testimony taken before the Court.

Mr. HOPPER, one of the respondent's counsel, desired time to prepare testimony to prove the truth of the return, and asked for a continuance, for that purpose.

The COURT could not agree to a continuance. If the facts were as stated by the counsel for the relator, there had been a cruel outrage of a criminal nature.

Mr. GILPIN stated that the respondent wished to stand on the ground of utter negation of the possession of the servants at any time.

No objection on the part of the respondent being made to the return being traversed orally, the counsel for the relator entered upon the examination of witnesses.

*John H. Wheeler*, sworn.—I am a native of the State of North Carolina, and a citizen thereof; I am the owner of three colored persons, named Jane, Dan and Isaiah, and have been for some

time; I hold them to labor under the laws of the State of North Carolina and of my country; I left Washington on Wednesday, the 18th; I was under orders from my government to proceed to the republic of Nicaragua forthwith; I have been the Minister for one year, and had returned with a couple of treaties, and was upon my return to take passage from New York, in company with my three servants, whom I was taking to their mistress, who is now in Nicaragua. My wife is a native of Philadelphia, where I married her. I was forced to go to the residence of my father-in-law, Mr. Thomas Sully, to get some articles of Mrs. Wheeler's. I got a trunk from Mr. Sully's house containing these articles, proceeded to the wharf, but found the two o'clock boat gone. I had to wait until five o'clock for the next train. I spent the intervening time at the nearest hotel—Bloodgood's, at Walnut street wharf.

On going on board the boat at a little before five o'clock, I retired with my three servants to the hurricane deck to get out of the noise and bustle; shortly before five o'clock—the last bell had just rung, at five minutes before five—while I was reading the evening papers, an individual, whom I recognize as Mr. Passmore Williamson (looking at the respondent), came up to me and asked if he might speak to my servants; I replied that I could not imagine what business he could have with my servants, and that if he had anything to say I was the proper person to say it to; Mr. Williamson then pushed past me, and asked the woman (Jane) if “she was a slave, and if she knew she was in a free country,” or something like it, and then, “if they (the servants) would like to be free;” the woman replied that she knew with whom she was going, where and how she was going; the respondent then took her by the arm, and began to force her away; I interfered and said to Mr. Williamson, “I wish you would go away;” two colored fellows who had come up, then seized and held witness, and one of them said, “if you make any resistance I will cut your throat;” do not know the proper names of the negroes who seized and held me; one of them is called “Rabbit;” by the interference of some gentleman, who seemed to be a traveller, the negroes released me, and I hurried down to the lower deck, and saw Williamson hurrying the woman off, and other

colored persons with the boys, who were struggling to get away; went up to Williamson and asked him what he was going to do with the woman; he answered that his name was Passmore Williamson, that he could be found at Seventh and Arch streets, and that he would be responsible for any legal claim he (witness) might have on the slaves. By this time the colored persons with Mr. Williamson had got the servants off the wharf, and turning down the first street above the wharf (Front street) hurried them into a carriage which was standing about a square below Walnut street, in a large open space with large warehouses in it (Dock street); after the negroes had got off the boat, Mr. Williamson walked behind the crowd, and said something in a whisper to a large burly policeman, who was standing near. I spoke to the policeman in a whisper, asking him to observe the people who were committing the outrage, but the policeman refused to have anything to do with the matter, as "he was not a slave-catcher."

*Cross-examined.*—Mr. Williamson walked back with me from the carriage; he offered to write his name down, but I told him I could write it myself; he gave no directions to the driver; it was not a regular coach stand; there were no other carriages near; the people standing about the carriage, and who hurried the servants into it, were colored.

*Thomas Wallace, sworn.*—I am an officer; I saw the occurrence on the avenue, but not on the boat; a crowd was coming down towards Dock street; I thought it was a fight, and went up; saw several negroes forcing along a colored woman who was holding back with all her strength, and two boys, who were also struggling; they were all crying; four or five black fellows had the boys; they said they were slaves, whom they were taking away; the defendant was following the crowd; saw him do nothing but follow after the negroes; the negroes were pushing the woman and boys along; they all pulled back; I followed to Dock street, and saw the negroes put the woman and boys in a carriage; I knew the negroes; the defendant whispered to me, and said that they were slaves—they were getting away—and asked me to protect them; I said that I would have nothing to do with the matter.

*Robert T. Tumbleston*, sworn.—I am a travelling agent between Philadelphia and New York; I was standing on the forward part of the boat, and saw a crowd; I went forward, and saw a colored woman and two boys being forced ashore by some colored men; I know two of the men, Custis and Ballard, who were very busy; they said the persons they had were slaves; Custis said to Mr. Wheeler, that if he interfered he would cut his throat from ear to ear; Custis had one of the boys in his arms; I followed a short distance, and then returned.

*William Edwards*, sworn.—I take messages to the line and from it; I was on the wharf when this thing occurred; I saw two boys forced away by two colored men; the boy cried, and was struggling very hard to get away from those who held him; there were ten or fifteen negroes in the crowd.

*Capt. Andrew Heath*, sworn.—Am in the employ of the Camden and Amboy Railroad Company; was on board the boat; saw a negro bringing a small boy down the stairs of the boat; the boy cried murder; there were twelve or fifteen negroes forcing the woman and two boys along in a crowd; the boys and woman kicked and cried to get away from their assailants; they said they wanted to go with their master; I saw the defendant walking along with them.

Mr. VANDYKE rose, after the above testimony had been taken, and after remarking on the evidence and the return which had been made by the respondent, said that he had two motions to make:—

1st. He moved for an attachment against the respondent, for contempt in making a false return to the writ.

2d. That he be held to bail in \$5,000, to answer the charge of perjury.

Mr. GILPIN asked whether the Court would now hear the respondent on the question of contempt. He was instructed by his client to say, that evidence could be offered which would put a different complexion on the case.

Judge KANE said he would either hear counsel on the question as it now stands, or he would hear evidence for respondent.

Mr. HOPPER said the motion of the District Attorney had taken himself and friends by surprise, and he would ask time for consideration.

Judge KANE said he understood that the respondent was willing to take the stand and swear that he had further evidence to offer. If the respondent would make oath that he had such evidence in prospect, the Court would consider the application for a continuance.

*Passmore Williamson* was then affirmed.—After the colored people left Dock street, in the carriage, I saw no more of them; I do not know where they are; have had no control over them, nor have I had any hand in their escape; my whole connection with the affair was this—I had heard that these three persons were in the city, and I felt anxious to inform them of their rights; for this purpose I went to Bloodgood's Hotel, where I saw a yellow boy; I asked him about the matter, and he told me where the party was; when I went upon the upper deck of the boat, I saw that man, (pointing to Mr. Wheeler); I approached the colored woman, and asked her if she knew her rights, that by law she was free; Mr. W. asked me what I wanted; I told him my errand; he (Mr. W.) kept interfering, and said she knew her rights and he did not want any interference with his affairs; Mr. W. reminded her of her children at home, and asked her if she wanted to leave them; she replied that she did not, but that she wanted to be free; Mr. Wheeler insisted that the woman did not want to go; there was an excitement, and the children cried; I saw them taken away; the object was secured of enabling them to act in accordance with their rights.

Question by Mr. VANDYKE.—Was it your object to take them from Mr. Wheeler?

A. It was, if they desired.

*Cross-examined.*—William Still, a colored man, first informed me of the matter; he laid upon my desk a note containing the facts; I told him to go to the wharf and attend to it, that I was going out of town; I afterwards altered my mind, and went to the

boat; I was there before William Still; I do not know who engaged the carriage; I don't know who had hold of Mr. Wheeler; I told Mr. Wheeler I would be responsible to him for any damage his rights might sustain.

Question by Mr. VANDYKE.—Did you say his “rights,” or his “legal rights?”

A. I do not recollect which I said. No man has rights that are not legal rights. I told Still to get the names if he could, and if they went to New York, we would telegraph there; he said there was nothing in the way of their remaining here, if they wished; I told him to hurry down to the wharf and see that their wishes were complied with. My first idea was to get out a writ of habeas corpus here, but as there was no Judge in town, I thought it best to telegraph; I was afraid that as the boat was about starting, we would not have time to accomplish anything. Still said nothing to interfere; when I went down to the boat, I saw him talking to Mr. Wheeler; he is clerk at the Anti-Slavery office, in North Fifth street. Still was the only person on board I knew; I saw him this morning; we had a conversation respecting this case; we conversed as to the safety of the party; he said they were safe, and that they would not return under any circumstances; he did not tell me where they were. I am Secretary of the Acting Committee of the old Pennsylvania Anti-Slavery Society. Mr. Still did not tell me at what time the party returned. I do not know who got into the carriage; I saw it drive off.

Mr. VANDYKE contended that the respondent's testimony was no testimony at all. His statement was not sufficient to contradict the positive evidence of disinterested witnesses. It was apparent that these slaves were within the control of the respondent. The latter, the District Attorney contended, had disposed of this property, and that he could reach it, if he felt disposed.

The respondent was the ringleader in robbing the owner of his property. He then leaves town, and this morning, early, he has a conference with his companion in crime.

Mr. VANDYKE went on to argue that the return to the writ was not only an evasion, but an absolute falsehood, and that the parties

were under the control of the respondent. He urged, in conclusion, that the respondent had not purged himself of contempt, and that he was liable for it and for perjury.

The respondent's counsel, after consultation, determined to leave the matter to the Court for decision, without argument.

Judge KANE said, that the case was of so grave a character, and the consequences so great to the defendant, that he was desirous, before pronouncing an opinion, to take time to consider and examine the matter. In the meantime, the defendant must enter bail in the sum of \$5,000, on the motion to hold him for perjury, to appear on next Friday morning for a further hearing, at which time he would deliver an opinion upon the subject. The motion for an attachment for contempt will go over, and be disposed of at the same time.

The Court then adjourned.

On Friday, the 27th, the Court delivered its opinion as follows:

KANE, J.—Colonel John H. Wheeler, of North Carolina, the United States Minister to Nicaragua, was on board a steamboat, at one of the Delaware wharves, on his way from Washington, to embark at New York for his post of duty. Three slaves, belonging to him, were sitting at his side on the upper deck.

Just as the last signal bell was ringing, Passmore Williamson came up to the party—declared to the slaves that they were free—and forcibly pressing Mr. Wheeler aside, urged them to go ashore. He was followed by some dozen or twenty negroes, who by muscular strength carried the slaves to the adjoining pier; two of the slaves at least, if not all three, struggling to release themselves, and protesting their wish to remain with their master; two of the negro mob, in the meantime, grasping Col. Wheeler by the collar, and threatening to cut his throat if he made any resistance.

The slaves were borne along to a hackney coach, that was in waiting, and were conveyed to some place of concealment; Mr. Williamson following, and urging forward the mob, and giving his name and address to Colonel Wheeler, with the declaration that he held himself responsible towards him for whatever might be his legal



rights; but taking no personally active part in the abduction after he had left the dock.

I allowed a writ of *habeas corpus* at the instance of Colonel Wheeler, and subsequently an *alias*; and to this last, Mr. Williamson made return, that the persons named in the writ, "nor either of them, are not now, nor was at the time of issuing of the writ, or the original writ, or at any other time, in the custody, power or possession of the respondent, nor by him confined or restrained: Wherefore he cannot have the bodies," etc.

At the hearing, I allowed the relator to traverse this return; and several witnesses, who were called by him, testified to the facts as I have recited them. The District Attorney, upon this state of facts, moved for Williamson's commitment,—1st. For contempt in making a false return;—2d. To take his trial for perjury.

Mr. Williamson then took the stand to purge himself of contempt. He admitted the facts substantially as in proof before; made it plain that he had been an adviser of the project, and had given it his confederate sanction throughout: He renewed his denial that he had control at any time over the movements of the slaves, or knew their present whereabouts. Such is the case, as it was before me on the hearing.

I cannot look upon this return otherwise than as illusory—in legal phrase, as evasive, if not false. It sets out that the alleged prisoners are not now, and have not been since the issue of the *habeas corpus*, in the custody, power or possession of the respondent; and in so far, it uses legally appropriate language for such a return. But it goes further, and by added words, gives an interpretation to that language essentially variant from its legal import.

It denies that the prisoners were within his power, custody or possession *at any time whatever*. Now, the evidence of respectable, uncontradicted witnesses, and the admission of the respondent himself, establish the fact beyond controversy, that the prisoners were at one time within his power and control. He was the person by whose counsel the so-called rescue was devised. He gave the directions, and hastened to the pier to stimulate and supervise their execution. He was the spokesman and first actor after arriving there.

Of all the parties to the act of violence, he was the only white man, the only citizen, the only individual having recognized political right, the only person whose social training could certainly interpret either his own duties or the rights of others under the Constitution of the land.

It would be futile, and worse, to argue, that he who has organized and guided, and headed a mob, to effect the abduction and imprisonment of others—he in whose presence and by whose active influence the abduction and imprisonment have been brought about—might excuse himself from responsibility by the assertion that it was not his hand that made the unlawful assault, or that he never acted as the gaoler. He who unites with others to commit a crime, shares with them all the legal liabilities that attend on its commission. He chooses his company, and adopts their acts.

This is the retributive law of all concerted crimes; and its argument applies with peculiar force to those cases in which redress and prevention of wrong are sought through the writ of habeas corpus. This, the great remedial process by which liberty is vindicated and restored, tolerates no language in the response which it calls for that can mask a subterfuge. The dearest interests of life, personal safety, domestic peace, social repose, all that man can value, or that is worth living for, are involved in this principle. The institutions of society would lose more than half their value, and courts of justice become impotent for protection, if the writ of habeas corpus could not compel the truth, full, direct, and unequivocal, in answer to its mandate.

It will not do to say to the man whose wife or daughter has been abducted, "I did not abduct her; she is not in my possession; I do not detain her, inasmuch as the assault was made by the hand of my subordinate, and I have forborne to ask where they purpose consummating the wrong."

It is clear, then, as it seems to us, that in legal acceptance the parties whom this writ called on Mr. Williamson to produce, were at one time within his power and control; and his answer, so far as it relates to his power over them, makes no distinction between that time and the present. I cannot give a different interpretation to his language from that which he has practically given himself, and

cannot regard him as denying his power over the prisoner now, when he does not aver that he has lost the power which he formerly had.

He has thus refused, or at least he has failed, to answer to the command of the law. He has chosen to decide for himself upon the lawfulness as well as the moral propriety of his act, and to withhold the ascertainment and vindication of the rights of others from that same forum of arbitrament on which all his own rights repose. In a word, he has put himself in contempt of the process of this Court and challenges its action.

That action can have no alternative form. It is one too clearly defined by ancient and honorable precedent, too indispensable to the administration of social justice and the protection of human right, and too potentially invoked by the special exigency of the case now before the Court to excuse even a doubt of my duty or an apology for its immediate performance.

The cause was submitted to me by the learned counsel for the respondent without argument, and I have, therefore, found myself at some loss to understand the grounds on which, if there be any such, they would claim the discharge of their client. Only one has occurred to me as, perhaps, within his view, and on this I think it right to express my opinion. I will frankly reconsider it, however, if any future aspect of the case shall invite the review.

It is this: that the persons named in this writ as detained by the respondent, were not legally slaves, inasmuch as they were within the territory of Pennsylvania when they were abducted.

Waiving the inquiry, whether, for the purposes of this question, they were within the territorial jurisdiction of Pennsylvania while passing from one State to another upon the navigable waters of the United States—a point on which my first impressions are adverse to the argument—I have to say:

1. I know of no statute, either of the United States, or of Pennsylvania, or of New Jersey, the only other State that has a qualified jurisdiction over this part of the Delaware, that authorizes the forcible abduction of any person or thing whatsoever, without claim of property, unless in aid of legal process.

2. That I know of no statute of Pennsylvania which affects to

divest the rights of property of a citizen of North Carolina, acquired and asserted under the laws of that State, because he has found it needful or convenient to pass through the territory of Pennsylvania.

3. That I am not aware that any such statute, if such an one were shown, could be recognized as valid in a Court of the United States.

4. That it seems to me altogether unimportant whether they were slaves or not. It would be the mockery of philanthropy to assert, that, because men had become free, they might therefore be forcibly abducted.

I have said nothing of the motives by which the respondent has been governed. I have nothing to do with them; they may give him support and comfort before an infinitely high tribunal; I do not impugn them here.

Nor do I allude, on the other hand, to those special claims upon our hospitable courtesy which the diplomatic character of Mr. Wheeler might seem to assert for him. I am doubtful whether the Acts of Congress give to him and his retinue, and his property, that protection as a representative of the sovereignty of the United States, which they concede to all sovereignties besides. Whether, under the general law of nations, he could not ask a broader privilege than some judicial precedents might seem to admit, is not necessarily involved in the cause before me.

It is enough that I find, as the case stands now, the plain and simple grounds of adjudication, that Mr. Williamson has not returned truthfully and fully to the writ of habeas corpus. He must, therefore, stand committed for a contempt of the legal process of the court.

As to the second motion of the District Attorney, that which looks to a committal for perjury, I withhold an expression of opinion in regard to it. It is unnecessary, because Mr. Williamson being under arrest, he may be charged at any time by the Grand Jury; and I apprehend that there may be doubts whether the affidavit should not be regarded as extra judicial and voluntary.

Let Mr. Williamson, the respondent, be committed to the custody of the Marshal without bail or mainprize, as for a contempt of the Court in refusing to answer to the writ of habeas corpus, heretofore awarded against him at the relation of Mr. Wheeler.

Mr. GILPIN, for the defendant, then asked leave to amend the return so as to conform to the views of this Court.

Judge KANE said he would give the defendant a full hearing upon any motion his counsel would choose to present.

After the decision by the Court, the United States Marshal of the District took the prisoner in custody, conveyed him to Moyamensing Prison, and handed him over to the keepers.

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*Supreme Court of Pennsylvania,—August, 1855.*<sup>1</sup>

*Ex parte* PASSMORE WILLIAMSON.

A writ of *habeas corpus* cannot issue out of a state court to inquire into the cause of a commitment for contempt by a court of the United States, by reason of any want of jurisdiction of the latter court in the original proceeding in the course of which the commitment was made.

After the decision in the foregoing case of *United States vs. Williamson* had been pronounced, and the defendant committed for contempt, his counsel applied to the chief justice of this court for a writ of *habeas corpus* it being alleged amongst other things that the District Court had had no jurisdiction of the original case.

The following opinion was delivered by

LEWIS, C. J.—This is an application for a writ of *habeas corpus*. It appears by the copies of the warrants annexed to the petition, that the prisoner is confined for a contempt of the District Court of the United States in refusing to make return to a writ of *habeas corpus* awarded by that court against him at the relation of John H. Wheeler.

The counsel of Mr. Williamson very frankly stated, in answer to an interrogatory on the subject, that they did not desire the useless formality of issuing a writ of *habeas corpus*, if, on view of the cause of detainer exhibited, I should be of opinion that the adjudication of the U. S. District Court was conclusive. The *habeas corpus* act does not require the writ to be granted in all cases whatever.

<sup>1</sup> Before LEWIS, C. J.

Whenever it appears upon the face of the petition, or, which is the same thing, by the detainer annexed to it and forming part of it, that the prisoner is "detained upon legal process, order or warrant for such matter or offences for which by the law the said prisoner is not bailable," the case is excepted out of the act; see act 18th Feb., 1785, sec. 1.

If the "process" be "legal" and the "offence" "not bailable," the judge is not authorized by the statute to discharge the prisoner. If not authorized to discharge, the law does not require the ridiculous formality of issuing the writ to bring the prisoner up, for the purpose of remanding him back to prison. The object, as appears from the preamble, is to relieve from "wrongful restraints." Where it appears from the party's own showing, that the restraint is *not* "wrongful" the writ should be refused. This is the settled construction of the English statute from which our act is taken. 3 Barn. & Ald. 420; 2 Chitty's R. 207; 3 Bl. Com. 132. The Supreme Court of the United States adopting the English construction, follows the same rule. 7 Wheat., 38; 3 Peters, 201. In like manner, notwithstanding the *letter* of the act, our own Supreme Court follows the rule of adhering to its *spirit* and *meaning*, and accordingly, where a case has been already heard, upon the same evidence, by another court, the writ will be granted or refused according to legal discretion. *Ex parte Lawrence*, 5 Bin. 304.

We come, therefore, at once to the cause of detainer. Is it a "legal process, order or warrant for an offence which by law is not bailable?" Mr. Justice Blackstone in *Brass Crosby's* case, 3 Wilson, 188, declared that "all courts are uncontrolled in matters of contempt. The *sole* adjudication of contempts, and the punishment thereof in any manner, belongs *exclusively*, and *without interfering*, to *each respective Court*. Infinite confusion and disorder would follow if courts could by writ of habeas corpus examine and determine the contempts of others. This power to commit, results from the first principles of justice; for if they have the power to decide they ought to have the power to punish." "It would occasion the utmost confusion if every court of this hall should have power to examine the commitments of the other courts of the hall for contempts; so that the judgment and commitment of each respective

court, *as to contempts, must be final and without control.*" 3 Wilson, 204. This doctrine was fully recognized by the Court of Common Pleas of England, in the case referred to. It has since been approved of in numerous other cases, in that country and in this.

In *ex parte Kearney*, 7 Wheaton, 38, it was affirmed by the Supreme Court of United States, in accordance with the decision in *Brass Crosby's* case, 3 Wilson, 188, that "when a court commits a party for contempt their adjudication is a conviction, and their commitment in consequence is execution." 7 Wheaton, 38; 5 Cond. R., 227. In the case last cited, it was also expressly decided that "a writ of habeas corpus was not deemed a proper remedy where a party was committed for a contempt by a court of competent jurisdiction, and that if granted, the court would not inquire into the cause of commitment." 7 Wheaton, 38. Many authorities to the same effect are cited by Chief Justice Cranch, in *Nugent's* case, 1 American Law Journal, (N. S.) 111.

But it is alleged that the District Court had no jurisdiction. It does not appear that its jurisdiction was questioned on the hearing before it. The act of Congress of 24th September, 1789, gives it power to issue "writs of habeas corpus which may be necessary for the exercise of its jurisdiction, and agreeably to the principles and usages of law;" and the same act expressly authorizes the judge of that court to grant writs of habeas corpus "for the purpose of inquiring into the cause of commitment; provided, that writs of habeas corpus shall in no case extend to persons in jail, unless where they are in custody under the authority of the United States or committed for trial before some court of the same, or are necessary to be brought into court to testify." Other acts of Congress give the United States Judges jurisdiction in writs of habeas corpus in cases therein specified. It does not appear that the writ issued for persons in jail, or in disregard of state process or state authority. It may be that in an action at law, where the judgment of a United States Court is relied on as a justification, the jurisdiction should be affirmatively shown. But in a writ of habeas corpus, issued by a judge having no appellate power over the tribunal whose judgment is shown as the cause of detainer, where the jurisdiction of the latter depends upon the existence of certain facts, the record being silent in regard



to them, and no objections to its authority are made on the hearing, the jurisdiction ought to be presumed, as against the party who might have raised the question at the proper time, but failed to do so. It is true, that if the jurisdiction be not alleged in the proceedings, the judgments and decrees of the United States Courts are erroneous, and may, upon writ of error or appeal, be reversed for that cause. But they are not absolute nullities. If other parties who had no opportunity to object to their proceeding, and who could not have writs of error, may regard them as nullities, it does not follow that the parties themselves may so treat them. *Kempe's Lessee vs. Kennedy*, 5 Cr. 183; *Skillern's Ex'r vs. May's Ex'r*, 6 Cranch, 267; *McCormick vs. Sullivan*, 10 Wheat., 192.

It is alleged that the right of property cannot be determined on habeas corpus. It is true that the habeas corpus act was not intended to decide rights of property, but the writ *at common law* may be issued to deliver an infant to a parent, or an apprentice to a master. *Com. vs. Robinson*, 1 S. & R., 353. On the same principle, I see no reason why the writ at common law may not be used to deliver a slave from illegal restraint, and restore him to the custody of his master. But granting, for the purpose of the argument, (which I am far from intimating,) that the district judge made an improper use of the writ,—that he erred in deciding that the prisoner refused to answer it,—that he also erred in the construction of the return which was made, and that he otherwise violated the rights of the prisoner, it is certainly not in my power to reverse his decision. He had clearly jurisdiction to try and punish contempts committed in the presence of the court, or by parties in disobeying its writs, process, orders, or decrees. See Act of Congress of March 2, 1831. If the Court had no jurisdiction of the writ of habeas corpus, that was merely matter of defence, to be urged on the trial of the charge of contempt. It touched not in the least the jurisdiction to try and punish for that offence.

If a writ of habeas corpus had issued from a state Court to the United States Marshal, and that court had adjudicated that the Marshal was guilty of a contempt in refusing to answer it, and had committed him to prison, the District Court of the United States would have no power to reverse that decision, or to release the Mar-

shal from imprisonment. No court would tolerate such an interference with its judgments. The respect which we claim for our own adjudications, we cheerfully extend to those of other courts within their respective jurisdictions.

For these reasons the writ of habeas corpus is refused.<sup>1</sup>

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*In the District Court of the United States, Northern District of California.*<sup>2</sup>

CRUZ CERVANTES. vs. THE UNITED STATES.

1. A grant by the Political Chief for the time being of Alta California, was not invalid, though it did not receive the previous approbation of the Territorial Deputation. The grant conveyed a present and immediate interest, and the neglect to obtain such approbation, if it were the duty of the grantee at all, would have been only the breach of a condition subsequent, by which the title was not forfeited.
2. In the same manner, conditions in such a grant, that the grantee should build and inhabit a house within a certain time, and also obtain judicial possession of the land, are conditions subsequent; and where, in a particular case, after the time limited, the grantee actually took possession of the premises, and had lived on them and cultivated them for three years, when he obtained judicial possession, which he maintained till the time of suit, a period of twelve years, it was held that the title had not been forfeited.
3. It is also no objection to such a grant (made in 1836) that the lands comprehended by it were within the limits of a mission.
4. It is, finally, no objection to such a grant, that the land was within ten leagues of the sea-coast, and that the approbation of the Supreme Executive did not appear to have been obtained.

The opinion of the Court was delivered by

MCALLISTER, J.—“The Board of Commissioners to ascertain and settle the private land claims in the State of California,” decided in favor of the validity of the claim of the appellant, from which decision the United States appealed to this Court, by whom the decree of the said Board of Commissioners was reversed, and a decree entered declaring the claim of the present appellant to be

<sup>1</sup> A subsequent application for habeas corpus was made to the Supreme Court in banc, which on the 8th of September, 1855, was refused, by a majority of the Court; Knox, J., dissenting. We shall publish the opinion in our next number.

<sup>2</sup> Sitting for the Adjudication of Land Titles.

invalid. From this last decision an appeal was taken to the Supreme Court of the United States, by whom it has been remanded to this tribunal with instructions to permit certain amendments to be made in the pleadings. See *Cervantes vs. United States*, 16 How. 619.

It now comes before us for decision on its merits, with the lights which have been shed upon some of the principles embodied in it by the decisions made by the Supreme Court in the recent cases of *Fremont vs. The United States*, and the *United States vs. Ritchie*.

From the evidence in this cause it appears, that the appellant having complied with all the provisions of the Mexican Government relating to colonization, obtained a grant from Don Nicolas Gutierrez, dated April 1st, 1836, in these words :

“Nicolas Gutierrez, Lieutenant Colonel of the permanent Cavalry, Commandant General, Inspector and Superior Political Chief *ad interim* of the Territory of Alta California. Whereas, Citizen Cruz Cervantes, a Mexican by birth, has applied, for his own benefit and that of his family, for the parcel of land known by the name of San Joaquin, bounded on the north by San Felipe, on the south by Santa Anna, on the west by the plain of San Juan, and on the east by the hills of the same name; and whereas, all the requirements of the laws and regulations in the matter have been complied with; now, by virtue of the authority in me vested, I have thought proper, by a decree of this day's date, and in the name of the Mexican nation, to grant to him the aforementioned parcel of land, declaring the same to be his property by these letters patent, subject to the approval of the excellent deputation and the following conditions :

“1st. He will submit to such conditions as shall be made by the regulations hereafter to be made for the distribution of vacant lands, and that meanwhile neither the grantee nor his heirs shall divide or alienate that which is adjudicated them, nor shall they subject it to rent, entail, bond, mortgage, nor to any incumbrance whatever, even if it should be for charitable purposes, nor convey it into mortmain.

“2d. He may fence it without obstructing crossings, roads, and servitudes, putting it to such use and culture as he may deem best,

but within one year at farthest he shall build thereon a house and shall inhabit it.

“3d. He shall solicit of the respective judge to give him judicial possession by virtue of this patent, by whom the boundaries shall be marked, at the limits of which, besides the landmarks, there shall be set some fruit trees or else wild ones of some usefulness.

“4th. The land of which donation is made is of two sitios de ganado mayor (two square leagues) according to the plat annexed to the proceedings. The judge who may give possession will cause it to be measured agreeably to ordinance, leaving the excess, (sobrante) which may result to the nation for its purposes as may be deemed convenient.

“5th. If he shall contravene these conditions he shall lose his right to the land, and it may be denounced by any other person.

“Wherefore I command, that holding this as a firm and valid title, the same be entered in the corresponding book, and be returned to the interested party for his own security and further ends.

“Given in Monterey on the 1st of April, 1836.

“NICOLAS GUTIERREZ.

“F'co del Castillo Negrete, S'rio.”

The parol evidence in the cause shows that Cervantes was living on and cultivating the premises “about two years after the revolution between Governor Chico and Gutierrez.” This, then, must have been some time in 1838. Another witness deposes to the appellant's living on the premises in 1846, and “that the house looked to be several years old,” and the continued occupation by him and cultivation of the premises down to the present time, is established. The genuineness of the grant and all preceding documents on which it is predicated is not disputed.

The objections to the claim are:

1st. That the grant had not received the approval of the Territorial Deputation.

2d. That a house was not built within the time prescribed by the grant, nor judicial possession applied for.

3d. That the land belonged to a Mission, and could not be granted.

4th. That the lands being within ten leagues of the sea coast, were not subject to colonization.

A reference to the first and immediately succeeding articles of the General Regulations of 21st November, 1828, for the colonization of Mexican territories, of which Upper California was one, will show the power of granting lands was confined to the political chiefs of those territories. True it is, that by the fifth article, it is declared that the grants made "shall not be definitely valid without the previous approbation of the Departmental Assembly, to which the respective expedientes shall be referred." If this article treats the grant as void until such consent shall have been obtained, then is the granting power transferred from the Political Chief to the territorial deputation, for it would be their approval and not his grant, which conveyed an interest in the land. But the article itself does not consider the grant void without such approval, for in case such approval is not obtained by the political chief, it is made his duty by the sixth article, "to report to the Supreme Government with the record of the case for its resolution." Intermediate the issuing of the grant, and the approval of the Departmental Assembly, and that if that could not be obtained, the promulgation of the Resolution of the Supreme Government, the grant is declared to be *not definitively valid*. It is then at least inceptively valid—but to what extent, as the Regulations are silent, we must look to the grant itself, the construction placed upon it by the Supreme Court of the United States, and the well established usage of the country for an answer.

In the case of *Fremont vs. The United States*, 17 How. 542, and in that of *The United States vs. Ritchie*, Id. 525, grants similar to that under consideration were reviewed by the Supreme Court. That tribunal declared in the former case, that the words of such grant "were positive and plain;" they purport to "convey a present and immediate interest." Now the consent of the territorial delegation could not vary the character of the grant. Passing by its terms, a "present and immediate interest," it presents the ordi-

nary case of an estate or interest conveyed to the grantee determinable on the happening of a future event. The usage of the country also established this interpretation of the grant. One of the witnesses in the case, E. P. Hartnell, deposes, he has resided thirty years in California, has filled the offices of Inspector General to the Missions, Collector of the Port of Monterey, Translator to the Military Government of California, and is now State Translator; is well acquainted with the usages and customs which prevailed for eleven or twelve years prior to the acquisition of the country by the Americans, in relation to the granting of lands. He states the usage was for the grantee upon receiving the Governor's grant, to consider himself entitled to enter into the granted premises, and so far from having to wait for judicial possession or the approval of the deputation, "I have known, (he says,) numerous instances in which neither the one nor the other was asked for many years." He further deposes, "it was always considered the duty of the Governor to do that, (to obtain the approval of the Assembly,) and I know, from my own knowledge, that whilst the deputation was held at Monterey, the Governor always did so. I never knew of any grantee interesting himself about getting the approval of his title, until it was rumored that the Americans were coming to take possession of the country." On his cross-examination he is equally explicit as to the usage and the general opinion of the inhabitants as to its existence. Viewed then, as the grant has been construed by the Supreme Court, or as it has been interpreted by the well established usage in California, during the Mexican rule, the Court considers that the failure of appellant to procure the approval of the Departmental Assembly, if it is to be deemed his duty so to have done, was the breach of a condition subsequent, for which the title of appellant cannot be forfeited.

The omission of appellant to build a house within the time prescribed by the grant, and to obtain judicial possession of the land, are clearly conditions subsequent. It has been urged, that the eleventh article of the General Regulations declares the grant to be "null and void," in case of a failure to occupy and cultivate.

But this section applies exclusively to *pobladores*, (settlers or colonists,) who shall have failed to cultivate the lands on the terms and with the number of persons or families agreed on. In such cases only, is the grant declared "null and void," and even in such cases the political chief is authorized to confirm the same in proportion to the part of the agreement fulfilled.

The conditions then, to build a house within the time prescribed by the grant, and to obtain judicial possession of the premises being conditions subsequent, the breach of both or either of them cannot operate, under the facts of the case, a forfeiture of appellant's title. *Arredondo's case*, 6 Peters, 729. *Fremont vs. The United States*, 17 How. 542.

The third objection to the validity of this claim is, that the lands granted were what are generally termed "Mission lands," and therefore not subject to colonization. This objection we deem to have been disposed of by the Supreme Court, U. S., in the case of *The United States vs. Ritchie*, 17 How. 525, in which it was decided not to be available.

The last ground taken against the appellant is, that the lands granted to him are situated within ten leagues of the sea shore, and therefore not the subject of grant without the previous approbation of the Supreme Executive Power.

"The principle, (say the Supreme Court,) which prevails as to all public grants of land, or acts of public officers in issuing warrants, &c., is, that the public acts of public officers, purporting to be exercised in an official capacity and by public authority, shall not be presumed to be a usurped, but a legitimate authority previously given, or subsequently ratified, which is equivalent."

It is a universal principle, where power or jurisdiction "is delegated to any public officer or tribunal, over a subject matter, and the exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject matter." *Arredondo's case*, 6 Peters, 729. In *United States vs. Clarke*, 8 Peters, 453, the Court say, "He who would contravene a grant executed by the lawful authority, with all the solemnities required by law, takes



upon himself the burthen of showing that the officer has transcended the powers conferred upon him, or that the transaction is tainted with fraud."

The principle under consideration, was extended to a case where a grant was issued by a Governor of East Florida, reciting a royal ordinance which authorized the issuing of grants to *foreigners*, for the consideration therein mentioned; but the grant proceeded to concede lands to a *citizen*, for a consideration *totally different* from that mentioned in the ordinance. The Court in such case, say, "although the order is recited, it (the grant,) does not profess to be founded upon it." This is apparent, (the Court say,) from the fact that the land is granted to a *citizen*, and for a consideration entirely different from that mentioned in the ordinance, and although the ordinance is recited in the grant, the Court proceed to predicate the power to make it upon the decree made by the Governor on 3d April preceding. To sustain his power to make such decree and grant, they enter into a general consideration of the Spanish laws, and after enunciating the general principle, "that a grant made by a Governor, if authorized to grant lands in his province, is *prima facie* evidence that his power is not exceeded," they state that the connection between the Crown and the Governor justifies the presumption that he acts according to his orders. His orders are "known to himself and to those from whom they proceed, but may not be known to the world. Such a grant, under a general power, would be considered as valid, even if the power to disavow it existed, until actually disavowed. It can scarcely be doubted, that in a Spanish tribunal, a grant having all the forms and sanctions required by law, not actually annulled by superior authority, would be received as evidence of title." 8 Peters, 451.

We do not consider the relative position between the king and a governor, under the Spanish rule, unlike that which existed between the executive and the territorial chief, under the Mexican régime, as to absolutism on the one hand, and dependence on the other. It is upon such presumed relation, the Supreme Court rests its argument to some extent in the case cited, and sustains the grant.

Now the argument against the validity of appellant's grant is, that the lands covered by it are within ten leagues of the sea coast, and without the previous approbation of the Supreme Executive power of Mexico, could not be granted. The general power to grant is not denied; but it is asserted that these specific lands were excepted from the granting power; and the 4th article of the colonization law of the 18th August, 1824, is relied on. For the present it may be admitted, that such is the clear import of that article, and the first reply to it is, that four years subsequently, in the year 1828, the Supreme Executive power did give its approbation as required. The act of 1824 did not express the form in which such consent was to be given. That was left to the discretion of the executive.

In 1828 the general regulations for the colonization of the territories of the Republic were announced by the Supreme Executive power. By the first article the power to "grant vacant lands generally within their respective territories," was delegated to the political chief. There is no limitation in terms as to vacant lands, within ten leagues of the sea coast; but there is a reference to a class of lands, a portion of which is well known to lie within the ten littoral leagues, and that reference is to be found in the 17th article, where it is provided that mission lands are not to be colonized, not because of their vicinity to the coast, but because it was yet to be determined by the government whether they were to be considered the property of neophytes, catechumans, and of Mexican settlers.

It is natural to suppose, that in the settlement of a new country, with a savage foe in the interior, with the ecclesiastical and military establishments on the coast, and a sparse population struggling into existence, that the lands first petitioned for, should be those immediately on the coast, affording safety from hostile attacks in the rear, and in front the means of escape in the hour of necessity.

In truth the very object of the law, (the settlement of families and cultivation of the soil,) could only be effected by primarily reclaiming the frontier lands on the coast. Accordingly, the political chiefs—not one, but all—proceeded, to grant vacant lands without distinction. It has been well argued by the board of commissioners

in this case, "that one political chief or governor, might have erred in the matter through ignorance, or from some improper motive, and so of one body of the deputation or junta; but that all should have done so through a series of years, and successions of terms, it is difficult to believe; and the evidence of this construction is heightened to the highest degree of moral and legal certainty by the acquiescence of the executive, after we must presume he had knowledge of this construction of his regulations, and never intimating, as far as we can learn, that there was any error in this uniform course of proceeding. His knowledge of all this is a presumption of law, from the requirement of quarterly returns to be made to him of all the grants that were made and the facts relating to them," 9th article, general regulation, 1828. In this case there was no fraud on part of appellant; no mistake on the part of the political chief. The former, in his first petition for a grant, gives the boundaries of the land, and in his second reiterates them, accompanying such petition with a map; and the proper functionary to whom the petition was referred, reported the land to be within the ten littoral leagues mentioned in the law of August 18th, 1824, and the report concludes "that the land may be granted to petitioner if the mission of San Juan Bautista, to whom it belongs has no objection." In face of the fact that the lands proposed to be granted were reported by the appropriate functionary to be within the ten littoral leagues, the governor proceeded to grant them. All other political chiefs before and since his time have exercised like power. All the Mexican functionaries recognized it—the most valuable portions of land were granted under its exercise, and the people of the territories acted upon it. Property conveyed under it passed from one to another by operation of law, and by act of the parties for years—all acted upon the belief of the right of the governors to grant, and of the correctness of the interpretation placed by them on the regulations. The usage and custom was well established, and the community to a considerable extent was built up under its operation. The Supreme Court have said "there is another source of law in all governments:—usage, custom, which is always to be presumed to have been adopted with the consent of

those who may be affected by it. The court not only may, but are bound to respect general customs and usages as the law of the land equally with the written law, and when clearly proved they will control the general law."

"We cannot impute to Congress the intention to not only authorize this court, but to require it, to take jurisdiction of such a case, and to hear and determine such a claim according to the principles of justice, by such a solemn mockery of it as would be evinced by excluding from our consideration, usages and customs, which are the law of every government, for no other reason than in referring to the laws and ordinances in the second section, Congress had not enumerated all the kinds of laws and ordinances by which we should decide, whether the claim would be valid if the province had remained under the dominion of Spain." *Arredondo's case.*

This court consider that the exception sought to be established in this case to the general power of granting by the political chiefs, is not clearly made out against the legal presumption which exists in favor of a grant on a fair interpretation of the phraseology of the general regulations of 1828, and the well established usage of the Mexican local authorities, acquiesced in for a series of years by the Supreme Executive power. Opposed to all these, is a verbal criticism upon two articles of the regulations of 1828, in connection with the 4th article of the Colonization Act of Mexico, 18th August, 1824.

The first act of the regulations, it is argued, authorizes the political chiefs to grant only in conformity to the act of the 18th August, 1824, and the third article directs the political chiefs to ascertain whether the requirements of that act are embraced in the petition, and whether the petitioner, as well as the land, possess the requisite conditions. Now, the act of colonization contained general provisions, which were designed to control the new system Mexico had recently adopted, and doubtless the general regulations of 1828 were intended to carry out the policy of that act. Among other provisions, it extended to all colonists certain guaranties—restricted the quantity of lands to be held by one person, directed certain distinctions to be made in the selection of grantees, and reserved to

the government the right to take precautions, in certain cases against foreigners.

The reference to that act by the regulations of 1828, may be regarded as simply adopting its general policy. The direction in the third act of the general regulations to the political chiefs to ascertain if the requirements of the law were embraced in the petition, and the persons as well as the land, possessed the requisite conditions, are but a repetition of the words in the first article, with the additional direction that he should ascertain if the persons who petitioned, if foreigners, applied with a view to settle in the country—if citizens, to live on and cultivate the soil, and that the land petitioned for was “vacant,” such being requisite conditions of persons and land coming within the purview of the regulations themselves.

But if this interpretation be deemed equivocal, and not a clear exposition of the intention to be gathered from the colonization act of 1824, and the general regulations of 1828, we consider there is such doubt on this point, that it cannot be successfully urged to defeat the claim of the appellant acquired under the interpretation of the granting power by all the political chiefs and lesser functionaries of the Mexican government, acquiesced in for years by the Supreme Executive power sanctioned by well established usage, and had thus become a rule of property under which large amounts of property have been acquired, held, and transferred during the existence of Mexican rule in California.

It has been strongly argued by counsel for the appellant that the colonization act of 1824 applies exclusively to foreign colonists, and is applicable to the States only, and does not extend to the territories of the Republic. In the view taken of this case, it is deemed unnecessary to discuss these questions.

In this case the evidence clearly establishes the fact that at no time did the appellant abandon his claim. Within two years after receiving his grant he took actual possession of the premises, and lived on and cultivated them until 1841, when the Mexican authorities placed him in judicial possession, which he maintained until the acquisition of Mexico by that country.

It is true he did not attain judicial possession until some five years after the date of his grant, but subsequently in 1841 he did obtain from the authorities such possession and has continued to hold under it to the present time. Under these circumstances, we consider that his claim is to be held valid by the rules prescribed for our guidance in the adjudication of this and similar cases.

It is therefore hereby ordered, adjudged and decreed that the decision and decree of the Board of Commissioners for the ascertainment and settlement of private land claims in California made in this case be confirmed, and that the claim of the appellant, Cruz Cervantes, be, and the same is hereby confirmed to the extent of two square leagues or sitios de ganado mayor, and for no more; being the same land described in the grant and expediente referred to therein, and of which judicial possession was given to him as appears by the evidence, provided that the said quantity to him granted, and now to him confirmed, be contained within the boundaries called for in said grant, and map to which the grant refers; and, if there be less than two square leagues, or sitios de ganado mayor, within the said bounds then there is confirmed to him the said less quantity.

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#### RECENT FRENCH DECISION.

##### *Tribunal Civil de la Seine, (4me Chambre.)*

##### BOYLE vs. GONDOM AND BARRIER.<sup>1</sup>

No one but the party to whom a letter is addressed, or its author, has the right to demand its production, even for the purposes of a judicial investigation. Therefore, where one who had brought a civil action in England, for a libel contained in a letter first published in a French journal, applied to a Court in France to compel the production of the letter by the editors of the journal, for the purpose of enabling him to use it on the trial in England, it was *held* that this could not be done without the consent of the author of the letter.

The circumstances out of which this case arose are as follows. The complainant, the Rev. Richard Boyle, a Roman Catholic

<sup>1</sup> The following report, except so much of the preliminary statement as bears on the proceedings in England, is taken from the *Journal des Debats* of Aug. 7, 1855.

priest, brought an action of libel, in England, against Cardinal Wiseman, a well known prelate of the Roman Catholic Church, for certain statements contained in a letter, first published in a French newspaper, *l'Univers*, on the 23d March, 1854, and afterwards in two English papers, the *Catholic Standard*, and the *Tablet*. On the first trial of the case the plaintiff was *nonsuited*, on the ground that he had failed to prove publication. The Court of Exchequer, however, granted a new trial in the case, because of a refusal of the judge at nisi prius to permit the defendant to be called to the stand as a witness, under the 14 and 15 Vict. c. 99. Another point in the case, was the rejection by the judge, of evidence of the contents of a letter written by the defendant, admitting the authorship of the one in question, which letter was in the possession of a person beyond the jurisdiction, and who refused to produce it. The Court, while appearing to agree that, where every reasonable effort to procure the document had been made in such a case, a resort to secondary evidence would be allowed, yet held that a mere demand of the letter by a stranger, of the holder, who did not disclose his object in making it, did not come within the category. *Boyle vs. Wiseman*, 24 Law Journ. Excheq. 160; 1 Jur. N. S. 115.

The case came on for trial again in 1855, when a verdict was found for the plaintiff for £1000. The defendant then, in his turn, moved for a new trial, which upon argument in the Court of Exchequer, was granted, on the ground of improper rejection of evidence for the defendant. See 19 Jurist, part ii, p. 246.<sup>1</sup> In order to enable him to procure the evidence deemed necessary by the English Courts, Mr. Boyle now brought the present suit in *Tribunal Civil de la Seine*, against M. Jules Gondom, editor of *l'Univers*, and M. Barrier, publisher of that journal, for the delivery up of the original of the letter published in its columns on the 23d of May, 1854, bearing the signature of Cardinal Wiseman. The complainant also asked for damages, in case of refusal.

<sup>1</sup> In a recent number of the *London Times*, we observe that this hardly fought case of Boyle vs. Wiseman, has been compromised. The defendant was to pay the costs, except of the second trial, a part of which only he was to assume, which amounted in all to about £1200. No apology or retraction was to be made.



*Me. Henry Cellier*, for Boyle, after calling attention to the facts, continued :—M. Jules Gondom, who professes to have received this letter, and M. Barrier, who has published it, cannot refuse the Rev. Mr. Boyle the means of establishing the truth with regard to it; otherwise we would have the right to insist that they adopt the whole responsibility of the publication, and even that they are guilty of fabricating an apocryphal letter; in either of which cases Mr. Boyle would be entitled to bring his action for damages against them. Acting on this view of the law, on the 19th of February last, he summoned them to produce the letter to him, informing them that his solicitor, Mr. Sherman, would call the next day at the office of the journal, accompanied by witnesses, to receive it. On the 20th, accordingly, that visit was made, but M. Jules Gondom avoided appearing, and M. Barrier declined to produce the letter. Mr. Boyle has, therefore, the right to his action by reason of this refusal, which is opposed to a lawful demand, and which prevents his obtaining justice elsewhere.

*Me. Templier*, on the part of Gondom and Barrier, thus replied to these arguments:—The right of demanding the delivery of a letter, or its deposit in the hands of a third person for a particular purpose, can belong only to the author, or to the party to whom it is addressed. These gentlemen cannot honorably accede to a demand whose object is to injure their correspondent, and to aggravate the position, in itself a difficult one, of a Catholic priest before a Protestant jury. Mr. Boyle ought, therefore, to be refused his claim. They do not desire, at present, and so far as is necessary, to interpose any personal exception, or to resist his receiving an official certificate to that effect; on the contrary, they are ready to make the required production, provided Mr. Boyle procures a regular authority to that effect from the Cardinal.

The COURT DECREED as follows :

Considering that to justify a demand for the production of a document, it is not sufficient for the party to allege an interest in its use; but he must further establish a title to the document itself.

That in the particular case, the letter in question does not belong on any title to Mr. Boyle ; and that the defendants are therefore justified in refusing to produce it except with the consent of Cardinal Wiseman.

With regard to the claim for damages :

Considering that in opening their journal to Cardinal Wiseman, to the defence of the position of Catholicism in England, they cannot be supposed to have had the intention of injuring an individual who was not even named to them.

For these reasons reject the claim of Boyle, but, at the same time, give him an official certificate (*lui donne acte*) of the declaration of Gondom and Barrier, that they do not intend to interpose any personal exception, and are ready to make the required production, on a regular authority from the Cardinal.

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## LEGAL MISCELLANY.

### LEGAL PRINCIPLES.

#### No. VIII.

The fact, that in our text books and digests, of all classes and qualities, the law is divided into particular subjects, and not particular principles, serves to blind us to the great truth, that principles are universal, extending through all subjects. Yet this truth is of the very highest practical importance. Often we are unable to determine a question by looking into the books on the subject to which it directly relates, while yet, it is in reality well settled. By its being well settled, we do not mean, that a case precisely like it has been adjudicated, but that cases involving the principle have been. If, for instance, our question relates to a liability under a bond, the principle which is to decide it may have been brought out and established in connection with the law of insurance ; and so by looking into a book on insurance, we may find our difficulty solved.

We cannot be too much impressed with the idea, that the common law, including as well, that administered in the equity, admi-

rality, and other like tribunals, as in the courts of the common law technically so called, is one body with one blood flowing through the whole, and the same nerves and fibres extending everywhere. No man can be a good lawyer on any one subject, who has not carried his investigations through the entire range of our jurisprudence. Quackery may boast of curing "old sores," without knowing anything else of the human system; but no true lawyer will imitate it.

We ought to have books, in which we could see, as on a map, the various principles of the law, traced, in all their relations, through the various subjects. And it is a little remarkable, that while the legal press is flooding us with valueless matter, in connection with much that is good, almost nothing of this kind is attempted. We have Broom's Legal Maxims,—not a first-class book, but still one of considerable value, and deserving a much wider circulation than it receives,—besides which we have nothing. Probably, the enterprise of producing books of this kind wouldn't pay. Lawyers do not wish to learn law in general, but the law of their particular cases—a flat contradiction, indeed, but they do not see it. How few, comparatively, we have, who study wisely, or even study at all. "The Law in Six Easy Lessons, without a Master, and not even requiring a Pupil," would be an immensely popular title-page; in fact, it would be a decided *hit*. We might suggest it to some of our professional scissors-grinders, who bear the name of legal authors and editors, and to their publishers; but while it would bring in, at first, a flood of money, the stream would soon stop. Those gentlemen who patronize their works, finding so short a cut to learning and eminence, would take it at once, and ask for nothing further.

Who has not seen a little child, sitting close to the fire and complaining of its being hot, without considering that the true thing to be done is to move back? How many lawyers complain to themselves, not their clients, of the embarrassments of their profession, of the difficulty of giving opinions that the Courts may not upset, of the vast search that every question of importance requires, of disappointments in their suits, and a world of things of the like kind, without the smallest appreciation of the remedy. Tell them

that they must become familiar with the principles of the law ; and they will reply that they have no time for that, they are so occupied with their cases. They have learned their A B C's, and have got over into the pictures.

Now, the study of cases, as they arise in practice, is not to be neglected. But he who does no more will never manage his cases well, nor advise well in them—never. He may think he does. He may think, when he pockets his client's money, that he gets it by no false pretences ; and his client may never learn the cheat. To be sure, if, in a particular case, he succeeds, that is all that is necessary. But if he loses, the difficulty may, and often does, lie in a mistake of which he never becomes conscious. So, if he wins, it may be by another's folly, not his own wisdom.

The "short" way to become eminent in legal knowledge, is to study perseveringly legal principles. He who will not employ this means, need never hope to see this end.

J. P. B.

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#### NOTICES OF NEW BOOKS.

**Principles of the Law of Personal Property**, intended for the use of Students in Conveyancing. By Joshua Williams, Esq. Second American from the Second English edition. With Notes and References to the latest American Decisions, by Benjamin Gerhard and Samuel Wetherill. Philadelphia : T. & J. W. Johnson. 1855. 8vo, pp. 484.

Mr. Williams' two treatises on personal and real property have been regarded, both in England and this country, with very great favor. The author has a most satisfactory style of composition. Clear and concise, and at the same time accurate and full, he gives in a reasonable space all the doctrines and decisions of the subject of which he treats.

The present edition of the work on Personal Property is enriched by the very learned and able notes of Messrs. Gerhard and Wetherill. These notes show the greatest thoroughness in research, and the most conscientious care in the citation of authorities. The learned editors seem to have spared no pains to render their labors as complete and useful as possible. They have made the book, indeed, most valuable "to the American profession, both as an elementary composition for the student, and as a book of reference to the practitioner." The character of the notes may be

judged of, by the statement of the editors that "more than thirty-five hundred cases have been referred to in them ; and in almost every instance where a citation has been made, the original book has been consulted, and, when practicable, the opinions of the judges have been quoted, rather than the syllabus of the reporter of their decisions, or any abstracts of such judgments." Edited in such a manner, Williams on Personal Property cannot fail to become a standard work in this country.

Independently, however, of its merits as a text book, it has peculiar claims to attention, as a very successful attempt to supply a want which has begun to be seriously felt. While there are many admirable treatises upon separate branches of the law of personal property, there have been hitherto none of substantial value which, treating the subject as a whole, have brought its general doctrines into relation, and presented them in a systematic and logical form. The result of this has been, that lawyers, compelled in most cases to study each branch in an independent manner, have come to lose sight of many important analogies ; and a painful want of unity in the various parts, has been produced. No one who will turn over the pages of any general work on the common law, can fail to be struck with this. Within the boundaries of real estate, all is connected and logical enough, but when he passes to the province of personal property, he finds only a series of treatises on topics whose relation seems scarcely more than that of arbitrary juxtaposition. Mr. Williams' book must be regarded as an important step towards a more scientific development of the subject.

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A Treatise on the Law of Executors and Administrators. By Edward Vaughan Williams. Fourth American, from the last London edition. With Notes and References to American Authorities, by Asa I. Fish. Two vols. Philadelphia: R. H. Small. 1855.

Williams on Executors is a book which it is unnecessary to praise. It has already become a legal classic. Admirable in its thoroughness and accuracy, it occupies the field without a rival. A fourth American edition shows that its merits are fully appreciated on this side of the Atlantic. Mr. Fish's notes are full and careful, and adapt this work to the necessities of the profession in the United States. The book is well printed and got up, and presents a handsome exterior.

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## ADMINISTRATION.

1. The County Courts of this State (Texas) may grant letters of limited administration upon the estates of deceased persons. This power existed under the Act of 1794, ch. 1, § 47, and is clearly created and defined as to the estates of non-resident decedents, by the Acts of 1842, chs. 69 and 165. But such special administration does not prevent a grant of the general administration in a *proper case* to a different person; and the two administrations may well subsist together. *Jordan vs. Polk*, - - - 555

2. A limited administration, as contemplated by the laws of this State, is not within the letter or spirit of the law prescribing to whom the general administration shall be granted. The next of kin or creditors cannot claim a right to special administration, if occupying an antagonistic relation to those who represent the deceased. So, where the deceased, a non-resident, had no estate in the limits of this State, except the subject of a suit which he was prosecuting at the time of his death against his brother, it was no error in the County Court to refuse the general or special administration to such brother, and confer the special administration upon an indifferent person. *Ibid.*

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See Collision—Lien.

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## AGENCY.

1. Where stock sold by an avowed owner, dealing as owner, turns out afterwards to be spurious and void, by reason of its having been illegally issued, the purchaser may recover back the price paid, though the seller was ignorant of his want of title. *Ketchum vs. Bank of Commerce of New York*. - - - 145

2. A pledgee of stock on collateral security, with power to sell at public or private sale without notice, and to assign coupled with a blank power for that purpose, who has actually transferred the stock into his own name, stands as to third persons in the light of owner, though himself still subject, it seems, to the pledgor's right to redeem; and is therefore liable to an action by a purchaser from him for the price paid, in case the stock turns out spurious. *Ibid.*

3. The principles which govern a common law partnership, are in general applicable to a Joint Stock Company, whether incorporated or not, except so far as modified by statute, or special rules of law. The introduction of new members into such association can, hence, be only authorized by joint consent; but this consent may be exercised either on each special occasion, or may be delegated to a particular, without power to redelegate it to an individual. The issue of certificates of stock in such association, being the introduction thereinto, of new partners, falls within this principle. *Ibid.*

4. *Held* on the construction of the charter of the New York and New Haven Rail Road Company, that a resolution of the Board of Directors of that company, by which Robert Schuyler was appointed "transfer agent" of its certificates of stock, was a valid delegation of power, and that certificates of stock issued by Schuyler as such agent were binding on the Company. *Ibid.*

5. The limitation of the amount of capital stock of the Company, in its charter, *held* not to prohibit the Board of Directors, nor their agent thus appointed, as regards third persons, from increasing the number of shares of stock, beyond the proportion between their par value and the capital stock. *Ibid.*

6. The registration of certificates of stock in the books of the Company, though made a pre-requisite to the right of voting or of exercising any control in the management of the Company, is not necessary to a valid title in the stock itself: and so the absence of a power to transfer will not affect the rights of a *bona fide* purchaser of a certificate of stock; he would thereby only become the equitable instead of the legal holder, but with the right to procure a transfer on the books of the Company. *Ibid.*

7. Where a transfer agent appointed by the Directors of an Incorporated Joint Stock Company, has fraudulently over issued stock, a director taking such stock directly from the agent is chargeable with constructive notice, especially where the fraud would have been discoverable by an inspection of the books of the Company. But this does not apply, where he purchases from a *bona fide* holder; and query, whether such constructive notice would affect a firm of which the director was a member. *Ibid.*

#### ANSWER.

See Equity. 2.

#### APPEAL.

See Equity. 2.

#### ATTACHMENT.

1. Our foreign attachment is a procedure *in rem*, and a sale of chattels under it passes the title clear of all liens, and the claims of the lien holders attaches to the proceeds, which will be distributed according to the rights of all. *Carryl vs. Taylor*, - - - - -

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2. Where chattels are sold as perishable, under a foreign attachment, the whole title is transferred, and all claimants and lien holders must come in and claim against the proceeds before distribution. *Ibid.*

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#### BILL OF EXCHANGE.

1. The vendor of a bill of exchange, though not a party to the bill, is responsible for the genuineness of the instrument; and if the name of one of the parties is a forgery, and the bill becomes valueless, the vendee is entitled to recover the price. *Gurney vs. Womersley*, - - - - -

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2. The defendants, who were bill brokers, having received from A. a bill of exchange drawn and endorsed by him, for the purpose of being discounted took it to the plaintiffs, who were money lenders, with whom the defendants had previously had dealings: they declined to endorse or guarantee it, and the plaintiffs, upon the credit of the acceptance, discounted it.



There were separate notes between A. and the defendants, and the defendants and the plaintiffs; and the rate of discount charged by the defendants to A. was higher than that charged by the plaintiffs to the defendants. The acceptance was forged by A., and the bill was valueless. *Held*, that the defendants having been found by the jury to have dealt with the bill as principals, the plaintiffs were entitled to recover the sum paid to the defendants upon the discount of the bill. *Ibid*.

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1. A common carrier, or other bailee for the transportation of property, must permit the consignee, if he requests it, to examine the cargo at the place of delivery, before he can demand his freight. *Isham vs. Greenham*. 498

2. The duties of the carrier, and consignee, are correlative: the one to deliver, and the other to pay the freight; both are mutual acts. *Ibid*.

3. Where the carrier demands a larger sum than that which is stipulated by contract, and refuses to deliver the property at the place of its destination until such additional sum is paid, he may be sued in tort for the conversion. *Ibid*.

4. Where the carrier refuses to receive any sum less than the whole amount he thus claims, and the consignee offers to pay the sum stipulated in the contract, no formal tender of that sum is required from the consignee: the law in such a case will not ask him to do a vain thing. *Ibid*.

5. A railway company, as common carriers of passengers and their luggage, are bound, on the arrival of a train at the terminus of the journey, to deliver a passenger's luggage into a carriage to be conveyed from their station, if required so to do, and if such is their usual practice. *Affirming Richards vs. The London and South Coast Railway Company. Butcher vs. The London and South-Western Railway Company.* - 694

6. Therefore, where a passenger on the arrival of the train got out of the railway carriage on to the platform with a part of his luggage, a small hand-bag, in his hand, which he gave to one of the company's porters to take to a cab, and the porter lost it, the company were held liable as for a non-delivery of the bag; it not being found by the jury that the passenger, by taking the bag into his own possession on the platform, had accepted that as a performance of the company's contract to deliver, according to their usual practice, into a cab. *Ibid*.

7. A declaration, setting out nothing but a general or ordinary engagement by the defendants as common carriers, is not supported by proof of a contract, containing a special exception of the liability of the defendants for any loss which may arise from "the damage of the river, fire, and unavoidable accident." In such case, the plaintiff must be nonsuited on the ground of variance between pleadings and proofs. *Davidson vs. Graham.* - - - - - 291

8. Such special exception to the defendant's liability may be lawfully created by special contract between the parties, though it cannot be made by general notice, known or unknown to the party engaging the services

of the common carrier. The case of *Jones vs. Voorhees*, 10 O. R. 145, explained. *Ibid.*

9. Although the common carrier may by special contract restrict his liability, so far as he is an insurer against losses by mistake or accident, he cannot thus exempt himself from losses caused by any neglect of that degree of diligence pertaining to his peculiar character as bailee. *Ibid.*

10. The burden of proof, that the loss occurred from one of the excepted causes, rests on the defendant. *Ibid.*

## CATTLE.

See Railroads.

## CHARITABLE USES.

1. A testator devised as follows: "Forasmuch as there will be a surplus income of my estate beyond what will be necessary to pay my said wife's annuity and the other annuities, I do therefore direct my said executors to invest the said surplus income and all accumulation of interest arising from that source yearly, for and during all the term of the natural life of my said wife, \* \* \* \* and from and immediately after the decease of my said wife, then all the rest, residue and remainder of all my estate, \* \* \* \* I authorize and empower my executors, or the survivor of them, after the decease of my said wife, to dispose of the same for the use of such charitable institutions in Pennsylvania and South Carolina as they or he may deem most beneficial to mankind, and so that part of the colored population in each of the said States of Pennsylvania and South Carolina shall partake of the benefit thereof." All the executors of the will died before the testator's widow, and without having attempted to make an appointment under the power conferred on them. *Held*, that the disposition of the residuary estate of the testator, subject to the power of appointment of the executors, failed, and that the heirs and next of kin of the testator were entitled to it. *Fontain vs. Ravenel*. - - - 264, 380

2. No Court of Chancery, either in South Carolina or Pennsylvania, can administer the fund in question, and it remains unaffected by the bequest, because the means through which it was to have been given and applied have failed. *Ibid.*

3. In England, when the Chancellor directs the application of property which has been the subject of an ineffectual charitable disposition, in accordance with the will of the sovereign, indicated under the sign-manual, or when that officer himself executes the *cy pres* power in regard to such property, he does not act in the discharge of his ordinary chancery powers. *Ibid.*

4. No special trust is vested in the executors, by reason of this power of appointment. It is separable and distinct from their ordinary duties and trust as executors. It was to be exercised after the death of the wife of the testator; but the executors died before her decease, and consequently they had no power to make the appointment. The conditions annexed by the testator to the power rendered the appointment impossible. *Ibid.*

5. There must be some creative energy to give embodiment to an intention which was never perfected. Nothing short of the prerogative power, it would seem, can reach this case. There is not only uncertainty in the beneficiaries of this charity, but there is a more formidable objection—there is no expressed will of the testator. He intended to speak through his executors, or the survivor of them, but by the acts of Providence this has become impossible. It is then as though he had not spoken, and no power can now speak for him except that of the *parens patriæ*. *Ibid.*

6. When there is nothing more than a power of appointment conferred by the testator, there is nothing on which a trust, on general principles, can be fastened. The power given is a mere agency of the will, which may or may not be exercised at the discretion of the individual. And if

there be no act on his part, the property never having passed out of the testator, it necessarily remains as a part of his estate. To meet such cases, a prerogative power, such as that of the king, in England, must be invoked, which there, through the Chancellor, can give effect to the charity. *Ibid.*

7. Some late decisions in England, involving charities, evince a disposition rather to restrict than enlarge the powers exercised on this subject. An arbitrary rule in regard to property, whether by a king, or chancellor, or both, leads to uncertainty and injustice. *Ibid.*

## COLLISION.

See Ship. 1—8.

1. Duties of steamers in the navigation of the Mississippi. *Shute vs. Goslee*; *Goslee vs. Shute*. - - - - - 465

2. A steamer leaving the ordinary and usual track of vessels under the circumstances, is bound to show some palpable necessity for the deviation. *Ibid.*

3. An ascending boat, running at great speed in a dark night, at a time when a descending boat is visible, of whose course she is doubtful, takes the risk of a collision: she ought to ease or stop her engines, till she is assured of the course of the other. *Ibid.*

4. A steamer is responsible for a collision which a better lookout than she had might have prevented. *Ibid.*

5. Where a collision is produced by the fault of one boat, she cannot complain that the other had not used extraordinary measures of precaution before, or the clearest judgment in the selection of the method of extrication, after the collision became imminent. *Ibid.*

6. A libellant, claiming damages on the ground of a collision with another boat, must make it appear that there was no want of ordinary care and skill, in the management of his boat, and that the injury for which he claims compensation, resulted from the sole fault of the other boat. But the faulty management of one boat, will not excuse the want of proper care and skill in the other. *Lucas et al. vs. The Steamboat Swann*. - - - - - 659

7. A case of damage resulting from inevitable accident, is defined to be, "that which a party charged with an offence, could not possibly prevent by the exercise of ordinary care, caution and skill." *Ibid.*

8. There is no ground for the conclusion in this case, that the injury was unavoidable; but on the contrary, it is a case of mixed or mutual fault. *Ibid.*

9. But to constitute a proper basis for a decree, apportioning the damages equally to each boat, as in a case of mixed or mutual fault, the evidence must enable the Court to find the specific faults of each, from which the injury resulted. *Ibid.*

10. If the Court is satisfied, that both boats were in fault, and yet from the conflict in the evidence, cannot find, with reasonable certainty, the specific faults of each, it constitutes a case of inscrutable fault; and, in such case, in accordance with the law as settled in the United States, a decree for the equal apportionment of the damages as resulting from the injury, may be entered. *Ibid.*

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## COMMITMENT.

See Habeas Corpus. 3.

## COMMON CARRIER.

See Carrier. Railroads. Steamboat.

## COMMON SCOLD.

See Criminal Law.

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## COMMITMENT.

See Habeas Corpus. 3.

## COMMON CARRIER.

See Carrier. Railroads. Steamboat.

## COMMON SCOLD.

See Criminal Law.

## CONSTITUTIONAL LAW.

See Judgment. 1—6.

1. In 1760, the Legislature of New Jersey authorized certain owners of meadow lands along Little Timber Creek to dam the said creek. The act is constitutional, and vests an interest; it is more than a mere license and cannot be revoked by the State. *Glover vs. Powell.*

2. The Legislature must be the sole judge and arbiter in determining what streams shall be navigable, and when they may be obstructed if their navigation destroyed for public necessity or convenience. *Ibid.*

3. An individual cannot question the legislation of the State as to the rights of navigation, unless he can call to his aid the paramount authority of the general government. *Ibid.*

4. What constitutes a navigable stream. *Ibid.*

5. In 1854, the Legislature passed an act for the removal of the dam erected and continued under the act of 1760; the act of 1854 violates the Constitution of the State, and an injunction will be granted by this Court to restrain any action under it. *Ibid.*

6. A forfeiture cannot be declared by the Legislature, it can only be done by the Courts in due process of law. *Ibid.*

7. A Court of the United States has the power to prevent by injunction the present or future erection of any bridge under the authority of one of the States, that by its construction will interfere with the navigation of a public stream upon which there is a commerce to any considerable extent with other States, though such stream lies wholly within the limits of the State. The question in such case is relative, whether the bridge be or be not a greater obstruction to commerce than benefit to the public. *Devos vs. Penrose Ferry Bridge Co.*

8. In such case, unless irreparable damage would be done to the defendants thereby, and though an answer be put in denying both the fact and the law, an interlocutory injunction may be granted upon affidavits, at once, until further order; and an issue may be then directed to determine whether the bridge under its present form, &c., is a nuisance to the navigation of the river, and if so, whether any bridge can be constructed at the particular spot which will not be a nuisance. *Ibid.*

9. An action by the Federal Government is subject to the forms of pleading and the rules of practice applicable to suits between individuals. *The United States vs. The Railroad Bridge Company, et al.,*

10. The commercial power of the Federal Government under the constitution, discussed. *Ibid.*

11. Land purchased for military purposes cannot be sold without special authority from Congress; otherwise as to land reserved out of the public domain and then abandoned. *Ibid.*

12. Construction of the Act of Congress of Aug. 4, 1852, granting the right of way through public lands. *Ibid.*

13. The power of a State to grant the right of eminent domain to a private corporation. *Ibid.*

14. The right of eminent domain is in the State, and the exercise of this right by a State is nowhere inhibited in the Federal Constitution, or in the powers exercised over the public lands. *Ibid.*

15. A State has power to authorize a railroad through the public lands of the United States. *Ibid.*

16. Irreparable injury to the public lands will alone justify an injunction. *Ibid.*

17. It is provided by the Constitution of Wisconsin, Art 8, § 1, that "the rate of taxation shall be uniform, and taxes shall be levied upon such property as the Legislature shall direct." In 1854, the Legislature of that State passed an act requiring "all Railroad Companies which were or should be organized within the State," to pay to the State Treasurer annually, for the use of the State, "a sum equal to one per cent. of the gross earnings of their respective roads." The Act further declared, that "this amount of tax shall take the place and be in full of all of the taxes



of every name and kind upon said road, and the property belonging to the said companies or the stock held by individuals therein; and it shall not be lawful to assess thereupon any other or further assessment or tax for any purpose whatever."

*Held*, that this act was not unconstitutional, though the annual assessment on Railroad Companies, was to be on income, instead of on property, as in other cases; and though the companies were exempted thereby from town, county, and district taxes. *The Milwaukie and Mississippi Railroad Co. vs. The Supervisors of Waukesha County*, - - - 679

18. Under the grant of power to Congress, to regulate commerce among the several States, as given by the Constitution of the United States, the general government has jurisdiction over navigable streams, so far as may be necessary for commercial purposes. *Jolly et al. vs. Terre Haute Draw-Bridge Co.*, - - - - - 29

19. A steamboat, enrolled and licensed pursuant to the Act of Congress, is entitled to the protection of the general government, while engaged in carrying on commerce between different States; and her owners have a right to use the navigable streams of the country, free from all material obstructions to navigation. *Ibid.*

20. In relation to the States carved out of the N. W. Territory, the guaranty in the ordinance of '87, as to navigable streams, is still in force. *Ibid.*

21. The Courts of the Union, having jurisdiction of the parties in a civil suit, are competent to administer the common law remedy for an injury sustained by reason of an unlawful obstruction in a navigable stream, without any express legislation by Congress, giving the remedy, and prescribing the mode of its enforcement. *Ibid.*

22. The national jurisdiction over navigable streams does not deprive the States of the exercise of such rights over them, as they may deem expedient, subordinate to the power granted by the Constitution of the United States. *Ibid.*

23. A bridge of sufficient elevation, or with a proper draw, is not necessarily an impediment to navigation; neither is any structure or fixture such impediment, which facilitates commerce instead of being a hindrance. *Ibid.*

24. The inquiry in this case is, whether the bridge with the draw erected by the defendant at Terre Haute, is a material obstruction to the navigation of the Wabash river. *Ibid.*

25. If it occasions merely slight stoppages and loss of time, unattended with danger of accident to life or property, it is not such obstruction. *Ibid.*

26. The Terre Haute bridge was built under a charter from the State of Indiana, which required a "convenient draw" in the bridge. This imports a draw which can be passed without vexatious delay, or risk; and, if not such a one, the charter is violated; but if it meets the requirement of the act of incorporation, and is yet a material obstruction, it is a nullity for the want of power in the legislature to pass such an act. *Ibid.*

27. If the jury find the bridge is a material obstruction, but that the injury sustained by the plaintiffs' boat was the result of recklessness, or want of skill in those having charge of her, the Bridge Company are not liable, and evidence of the good professional reputation of the pilot will avail nothing, if in this particular case, he was reckless and unskilful. *Ibid.*

28. Depositions taken under the Act of Congress, without notice to the opposite party, are admissible in evidence; but it is for the jury to determine the weight and credibility to which they are entitled. *Ibid.*

29. The evidence of experts, if uncontradicted and unimpeached, is entitled to great weight. *Ibid.*



30. If the jury find for the plaintiffs, they may include in the damages given, the probable earnings of their boat, for the time she was delayed in repairing the damages sustained. *Ibid.*

#### CONSTRUCTION.

See Will.

#### CONTEMPT.

See Habeas Corpus. 8.

#### CONTRACT.

1. One to whom a slave is hired for a year, is entitled to no abatement of the price because of the death of the slave after the commencement of the term. *Lennard vs. Boynton*, - - - - - 428

2. A receipt containing an agreement, stipulation, or condition between the parties, is in the nature of a contract. *Wilson vs. Bailey*, - - - 432

3. Parties who appear on the face of a contract, to be the *only* parties bound, cannot introduce parol proof to show that they are not the parties bound, but the third persons are in reality the contracting parties. *Ibid.*

4. It is admissible, to show that the act of the party signing the contract, is also the act of his principal, so as to render the latter *also* liable. *Ibid.*

5. Where the defendant answers that he executed the contract upon which he is sued, as a broker or agent, and after the testimony is before the Court, claims to amend his answer so as to show he executed the contract under a mistake of his legal responsibility thereon, the Court will not grant leave to amend unless the facts proved, show at least a reasonable probability that this can be established. *Ibid.*

6. A master cannot absolve himself from the legal and equitable obligation to take care of his slave; and if he refuse to do so, he is liable for medical and other relief furnished by others. *Thompson vs. Alexander*, 543

7. If a slave be hired to an insolvent, or be out of the possession of the hirer, and be placed in a situation to require instant and indispensable medical aid or other assistance; in such a case the owner, as well as the hirer, would probably be liable for necessary medical and other services. *Id.*

8. The hirer of the slave, and not the general owner, is liable in an action for medicine and medical services rendered the slave while the term of hiring continued—the services and medicine not being rendered at the request of the owner, but at the request of the hirer. *Ibid.*

9. A particular custom in a country, that the general owner shall pay the expenses, does not supersede or control the legal principle. *Ibid.*

10. The hirer of a negro is not entitled to an abatement from the price on account of the sickness of the negro, unless the sickness originated in causes existing at the time of hiring, and which were unknown to the hirer. *Ibid.*

11. The hirer of a slave is bound to use ordinary diligence, in regard to the health of the slave; that is, such diligence as a prudent man commonly takes of his own slave; and this ordinary diligence is to be employed, not only in protecting the slave from danger and disease, but likewise in discovering the disease if it exists, and in its treatment also. *Ibid.*

12. If the hirer of a slave fail to perform his duty in supplying the slave with medical and other necessary assistance, the owner may do it, and look to the hirer for reimbursement. *Ibid.*

13. Under special circumstances, the hirer, although preliminarily liable to the physician, might, nevertheless, be entitled to relief, as between the owner and himself, especially in a Court of Equity. *Ibid.*

14. If a slave hired for general and common service, be employed at any hazardous business, without the consent of the owner, and death, or any other damage ensue, the hirer would make himself liable for the injury. *Id.*

15. Notwithstanding the hirer be answerable, in the absence of any agreement to the contrary, for expenses attendant on the sickness of a slave, it is competent to protect himself by contract. *Ibid.*

#### COPYRIGHT.

1. The copying of a statuette by means of the daguerreotype or other

photographic apparatus, and the use of the stereoscope to give relief to the copies thus made, to the injury of the owner of the original work of art, is an infringement of his copyright. *Marchi vs. Samson.* - - 570

2. By stat. 5 & 6 Vict. c. 45, s. 18, when the proprietor of any periodical work shall employ any person to compose any article thereof, and the same shall have been composed on the terms that the copyright therein shall belong to such proprietor, the copyright shall be the property of such proprietor: *Held*, that these terms need not be expressed, but may be implied. *Sweet vs. Benning.* - - - 684

3. Where an author is employed by the proprietor of a periodical work to write for it articles on certain terms as to the price, but without any mention of the copyright, it is to be inferred that the copyright was to belong to such proprietor. *Ibid.*

4. The defendants, who were proprietors of a periodical professing to be an analytical digest of equity, common law, and other cases, copied verbatim the head or marginal notes of cases from reports, the copyright of which was in the plaintiffs, without their consent: *Held* to be a piracy, (Maule, J., *dissentiente.*) *Ibid.*

## CORPORATION.

See Agency. 3.

## CRIMINAL LAW.

1. No indictment can now be sustained in Pennsylvania against a female, as a common scold. *Commonwealth vs. Hutchinson.* - . 118

2. Whether an indictment concluding "against the peace of the faithful subjects of this Commonwealth" is good, *dubietur.* *Ibid.*

## COVENANTS FOR TITLE.

See Vendor and Vendee.

## DAMAGES.

See Negligence.

## DEED.

An exception in a grant of lands in these words, "excepting and reserving out of the said piece of land so much as is necessary for the use of a grist-mill on the east side of the road, at the west end of the said mill-dam," is a good exception; but until the grantor or his assigns exercise the right reserved, and builds the mill, it is not operative, and ejectment cannot be sustained. *Mathews vs. Mathews.* - - - 117

## DEVISE.

See Will.

## DOMICILE.

See Russell *vs.* Harvey. - - - 560

## EDITOR.

1. The editor of a collective work, has the right, even in the absence of any special agreement, to make such changes and suppressions in the articles of contributors, as he may judge proper, so long as those changes and suppressions do not affect the plan and idea of the original. *Malgaigne vs. De Saint Priest.* - - - 571

2. The task of correcting for the press, the proofs of articles in such a work, belongs to the editor. *Ibid.*

## EJECTMENT.

See Deed.

## EQUITY.

See Charitable Uses, Injunction.

1. Under the rules of the Courts of Equity in Pennsylvania, a defendant

- may by answer protect himself against discovery, through a denial of the complainant's title, to the same extent as he could by plea in England: and he is not deprived of this right by submitting unnecessarily to answer some of the interrogatories of the bill, against which he might also have protected himself. *Perry vs. Kinley.* - - - 183
2. Under the Act of 1845, of Pennsylvania, with regard to appeals in equity, an appeal perfected, after the levy of a *fi. fa.*, or a decree, but before sale, is a supersedeas. *Chillas vs. Brett.* - - - 116

## EVIDENCE.

1. Articles of co-partnership having been formally executed, it is not competent for one partner to prove by parol that a consideration was to be paid by the other for making the contract, other than appears in the instrument; there being no allegation of mistake or fraud in preventing the insertion of the stipulation. *Brett vs. Chillas.* - - - 407
2. On a trial for murder, the prisoner's counsel were about calling witnesses to prove his insanity, when he interposed, refused to permit that defence to be set up, discharged his counsel and submitted his case to the jury without evidence. The counsel remonstrated, and offered to establish his insanity by irresistible proof, but the Court overruled their objection, and refused to hear them further in his defence. *Held* to be error, and that the evidence should have been permitted to go to the jury. *State vs. James Patton, appellant.* - - - 532

## EXECUTORS.

See Set-off.

## FORCE BILL.

See Habeas Corpus. 1—2.

## FOREIGN ATTACHMENT.

See Attachment.

The goods of a non-resident debtor, in the hands of a person residing in this State, are liable to be held by a writ of foreign attachment, although the goods themselves are in another State. *Childs vs. Digby.* - 801

## FORGERY.

See Bill of Exchange.

## FUTURE ADVANCES.

See Mortgage.

## GRAND JURY.

1. When a prisoner has been indicted by the Grand Jury upon evidence which appeared solely by affidavits accompanying the indictment and agreed to be read, and the facts in which were conceded to exhibit no legal evidence whatever, of the violation of a statute concerning false pretences, the Court will quash the indictment. *The People vs. Herman Ristenbatt.* 418
2. Indictment defined, and authorities for definition cited. *Ibid.*
3. The Grand Jury is without authority to indict for want of jurisdiction of the subject matter, except upon sworn legal testimony, duly taken before a constituted authority. *Ibid.*
4. If there is any legal proof of the offence charged, no matter how little, the Court will not quash the indictment, but will send it for trial to a petit jury. *Ibid.*

## HABEAS CORPUS.

1. The 7th section of the Act of Congress of 2d March, 1833, commonly called "The Force Bill," which authorizes the writ of *habeas corpus* to be

issued by the courts of the United States, under certain circumstances, for the protection of officers, and others acting with them, in execution of the laws of the United States, is to be confined in its application to cases where there has been an avowed purpose, by some authority or law of a state, to disregard an act of Congress, and to imprison or otherwise punish the officers of the United States for enforcing it; and operates, moreover, only in cases where such purpose appears on the face of the proceedings. Where a *habeas corpus* has been issued in pursuance of a statute, by a United States Court, it has no right to go behind the return to the writ; and if it does, and discharges the relator, upon evidence taken at the hearing, such discharge is inoperative, and will be disregarded by a State Court. *Thomas vs. Crossin.* - - - - -

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2. The marshal and deputy marshals of the C. C. for the Eastern District of Pennsylvania, were arrested under a *capias*, in a civil action of assault and battery, for abuse of power, brought in the Supreme Court of Pennsylvania. They took out a *habeas corpus* to the Circuit Court. On the hearing, evidence as to the real cause of action in the suit was entered into, and the relators discharged. The sheriff returned these facts to the *capias*. An attachment was applied for by the plaintiff against the sheriff, for not bringing in the bodies of the defendants. The Court held that the discharge by the United States Court was invalid, but refused the attachment under the circumstances, the plaintiff having unnecessarily delayed his application. It was decided, however, that the defendants might be considered as discharged on common bail, and that the plaintiff might proceed regularly in his action. *Ibid.*

3. Where the defendant in a *habeas corpus* makes an evasive or false return thereto, he may be committed for a contempt, in order to compel obedience to the writ. *United States ex rel. Wheeler vs. Williamson.*

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4. The return to a *habeas corpus*, denying that the persons for whose benefit the writ is issued, are in the defendant's "custody, possession, power, or control," may be traversed and proved false on the hearing. *Ibid.*

5. In a case where the relator and the defendant were citizens of different States, a Court of the United States granted a *habeas corpus*, the alleged detainer being without any authority of law, and of a purely civil nature. *Ibid.*

6. The writ of *habeas corpus* may be issued on the petition of a master, whose slaves have been taken and detained from him by force. *Ibid.*

7. It is not material in such case that the abduction of the slaves from their master has taken place while the master was in bona fide transit over the soil of a State whose laws prohibit the institution of slavery. Even if the slaves thereby became free, it would not justify their forcible removal, without authority of law, and against their consent and that of their master. *Ibid.*

8. A writ of *habeas corpus* cannot issue out of a State Court to inquire into the cause of a commitment for contempt by a Court of the United States, by reason of any want of jurisdiction of the latter Court in the original proceedings, in the course of which the commitment was made. *Ex parte Passmore Williamson.* - - - - -

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## HANSE TOWNS.

See Ship. 4.

## HUSBAND AND WIFE.

See Married Woman's Act.

1. Where the husband occupies the relation of trustee to his wife, and takes possession of her property in that capacity, such possession will not bar her right if she survive him. *Gochenaur's Estate.* - - - - -

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2. Reduction, by a husband, of his wife's personal property into his

possession—so as to change the ownership—is a question of intention to be inquired of upon all the circumstances. *Ibid.*

8. Conversion is not reduction, but only evidence of it. *Ibid.*

4. Clear proof that the husband received his wife's money as a loan, or a disclaimer of intention to make it his own property, will preserve her right of survivorship. *Ibid.*

5. Alleged admissions to that effect by the husband must be scanned with great vigilance, to prevent the consequences of misapprehension. *Ibid.*

6. Interest accruing during the husband's lifetime cannot be allowed, in the distribution of his estate, upon a sum of money belonging to his wife, that was in his hands, and which he might at any time have reduced into his own possession, when there was nothing to indicate that he was willing to pay interest for it. *Ibid.*

#### INDICTMENT.

See Criminal Law. See Grand Jury.

#### INFANT.

1. An infant who is furnished with necessaries, and the means in cash of procuring them, by his parent or guardian, or from other sources, is *prima facie* not liable for necessaries furnished by a stranger or tradesman on credit; and a party who seeks to evade the operation of the rule must prove a state of destitution and necessity in the infant. *Burghart vs. Hall*, 4 M. & W. 727, dissented from. *Rivers vs. Gregg.* - - - - - 88

2. But a policy of insurance effected by the creditor under such circumstances, on the life of the infant as security for his debt is not affected, it seems, by its invalidity: and at any rate, the proceeds of the policy cannot be claimed by the infant's administrator. *Ibid.*

#### INJUNCTION.

See Constitutional Law. 7, 8, 16.

1. The principle is well established, that every common trespass is not a foundation for an injunction, where it is only contingent and temporary; but if it continue so long as to become a nuisance, the Court will interfere and grant an injunction. *Whitfield vs. Rogers.* - - - - - 44

2. The rule is laid down that, in order to give jurisdiction, there must be such an injury, as from its nature is not susceptible of being adequately compensated by damages at law, or such as, from its continuance or permanent mischief, must occasion a constantly recurring grievance. *Ibid.*

3. A private individual may obtain an injunction to prevent a public mischief, by which he is affected in common with others. *Ibid.*

#### INSANITY.

See Evidence.

#### INSCRUTABLE FAULT.

See Collision.

#### INSURANCE.

1. A marine policy is to be construed according to the general and known course of trade with regard to vessels of a similar character, with a similar cargo, and on a similar voyage, to that insured. *Mobile, &c. Insurance Co. vs. McMillan.* - - - - - 671

2. A policy of insurance was made on a cargo of cotton, shipped on a sea-going steamer, the risk to commence at the port of Mobile, and to continue and endure until the goods were safely landed at the port of New Orleans. The instrument was in the usual form, and employed only the usual terms, of a marine policy. The vessel arrived in due time at her accustomed berth on the southern shore of Lake Pontchartrain, which is well known to be the port of New Orleans for vessels of such character, and from whence goods are conveyed by railway to the city itself. After she had discharged safely a portion of her cargo, an accidental fire destroyed, on the wharf, so much as she had landed. *Held*, that the risk

under the policy terminated on a delivery at the wharf, and did not continue until delivery to the consignee, or his agent; that it was not necessary that the goods should be landed at the place where it was usual for the consignee to receive and take charge of them; and that the insurers were, therefore, not liable. *Ibid.*

3. In this case, the policy was a valued one upon 198 bales of cotton, valued at \$50 a bale. Of these, 134 bales had been landed, and been destroyed by the fire. *Held*, that the contract was a severable one; that the insurers would have been liable, if at all, only for so many bales as were actually destroyed; and that the insured could not recover as for a total loss. *Ibid.*

#### JUDGMENT.

1. A judgment of one court will not be enforced by another, unless it is certain in itself, or is capable of being made so by intendment or presumption. *Fritz vs. Fisher.* - - - - - 248

2. It seems, that a defence to the judgment of another State on the ground of want of notice should be pleaded; and that when it is not, the judgment will not be held invalid, merely because the record fails to show that notice was given. *Ibid.*

3. When a ship has been seized under a foreign attachment issued out of a State Court and is in the hands of the sheriff, a subsequent seizure by the marshal under an attachment for mariner's wages issued out of the District Court of the United States, can operate only as a contingent seizure, and depends for its efficacy on the event of the ship or its proceeds, or part of them, being afterwards discharged from the seizure under the process of the State Court. *Carryl vs. Taylor.* - - - - - 394

4. There is no such superiority in the United States Court or in its attachment for mariners' wages, as entitles such a process to override and frustrate the previous seizure under the process of the State Court; and a sale under it while the ship remains in the custody of the State Court, or after the State Court has sold it under the foreign attachment proceeding, is void for want of jurisdiction of the subject matter. *Ibid.*

5. In a harmonious system of government the same property may be the subject of several seizures on writs from different Courts, but all after the first seizure must be subordinate to it and contingent, and can take effect only after the first seizure has been satisfied or released. *Ibid.*

6. It is an essential rule of harmony, that, among co-ordinate jurisdictions, that one is exclusive which is first attached. *Ibid.*

#### LAND LAW.

1. A grant by the Political Chief for the time being of Alta California, was not invalid, though it did not receive the previous approbation of the Territorial Deputation. The grant conveyed a present and immediate interest, and the neglect to obtain such approbation, if it were the duty of the grantee at all, would have been only the breach of a condition subsequent, by which the title was not forfeited. *Cruz Cervantes vs. The United States.* - - - - - 745

2. In the same manner, conditions in such a grant, that the grantee should build and inhabit a house within a certain time, and also obtain judicial possession of the land, are conditions subsequent; and where, in a particular case, after the time limited, the grantee actually took possession of the premises, and had lived on them and cultivated them for three years when he obtained judicial possession, which he maintained till the time of suit, a period of twelve years, it was held that the title had not been forfeited. *Ibid.*

3. It is also no objection to such a grant (made in 1836) that the lands comprehended by it were within the limits of a mission. *Ibid.*

4. It is, finally, no objection to such a grant, that the land was within ten leagues of the sea-coast, and that the approbation of the Supreme Executive did not appear to have been obtained. *Ibid.*

**MORTGAGE.**

See Ship. 6.

A mortgage in the common form was given to secure moneys covenanted to be advanced as buildings upon the premises progressed, *held*,

1. That the instrument by which the terms of the loan was regulated, need not be recorded.

2. That the mortgage had priority of lien over the claims of mechanics, from the date of its record, and not from the dates of its actual advance.

3. The agreement that the money should be appropriated towards paying for materials and workmanship, neither postponed the mortgage nor required the mortgagee to see to the application of the money. *Cadwalader vs. Montgomery*, - - - - - 169

**NEGLIGENCE.**

See Railroads.

1. The jury in estimating damages under the Act of April 15, 1851, may take into consideration the age, habits, health, and pursuits of the deceased. The measure of damages is the absolute value of the life lost, measured according to its own merits, and not according to the necessities of the kindred. *Pennsylvania Railroad Co. vs. M'Closkey's Administrator*, 412

2. The principle that allows an action for death of a freeman caused by negligence, discussed and re-stated. *Ibid.*

3. The personal representatives may continue an action commenced under the statute, and recover the very damages to which deceased would have been entitled, had he survived until verdict. *Ibid.*

**NOTICE.**

See Carrier, 8, 10. Agency, 7.

**NUISANCE.**

See Constitutional Law, Injunction.

**ORPHANS' COURT.**

The Orphans' Court and its auditors have jurisdiction of the disputed claim of a creditor against the estate of a decedent, whether the estate be solvent or insolvent. *Gochenaur's Estate*, - - - - - 486

**PASSENGER ACT.**

Penalties under the Passenger Act (of Congress) of 1848, can only be recovered by action of debt on the common law side of the District Court of the United States, and not by libel in Admiralty. The penalties are personal, and there is no lien on the vessel, and no remedy *in rem*, to enforce them. *United States vs. Brig Neptune*, - - - - - 48

**PATENT.**

1. The extent of the rights secured to the patentee stated, and the case of *O'Reilly vs. Morse* cited and affirmed. *American Pin Co. vs. Oakville Co.*, - - - - - 136

2. The means specified in the patent to produce the effect, and nothing more, are secured to the patentee, and there can be no infringement unless the same substantial means are used in both the plaintiffs' and defendants' machines. *Ibid.*

**PLEADING AND PRACTICE.**

See Carrier, 4, 7. Judgment, Equity.

**PLEDGE.**

See Agency. 1—3.

**POLICY OF INSURANCE.**

See Insurance.



## RAILROADS.

See Constitutional Law—Negligence—Master and Servant.

1. There is no law in Ohio prohibiting the owners of domestic animals, consisting of cattle, horses, hogs, &c., from permitting such animals to run at large upon the range of unenclosed lands, except when unruly and dangerous, and the rule of the common law of England, requiring the owner of such animals to keep them on his own land, or within enclosures, has never been in force in Ohio, being inapplicable to the circumstances, condition and usages of the people, and also inconsistent with the legislation of the State. *Kerwhaker vs. The Cleveland, Columbus and Cincinnati Railroad Company.* - - - - - 341

2. The owner of such animals, in allowing them to be at large on the range of unenclosed lands, is not chargeable with *an unlawful act*, or an omission of *ordinary care* in keeping his stock, doing nothing more than that which has been customary, and by common consent, done by the people generally since the first settlement of the State, subject to the qualification, however, that animals which are unruly or dangerous, are required to be restrained. *Ibid.*

3. There is no law in this State requiring any person to fence or enclose his own lands; yet the person who leaves his grounds unenclosed, takes the risk of occasional intrusions thereon, by the animals of others running at large. And the owner of such animals, in allowing them to be at large, takes the risk of their loss, or of injury to them by unavoidable accident, from any danger into which they may happen to wander. *Ibid.*

4. The right of a railroad company to the free, exclusive and unmolested use of its railroad track, is nothing more than the right of every land proprietor, in the actual use and occupancy of his lands, and does not exempt the company from the duty enjoined by law upon every person, so to use his own property as not to do any unnecessary injury to another. *Ibid.*

5. There is no law in Ohio requiring railroad companies to fence their roads, but when they leave their railroads open and unenclosed by sufficient fences and cattle-guards, they take the risk of intrusions upon their roads by animals running at large, as do other proprietors, who leave their lands unenclosed; so that the owner of domestic animals, in allowing them to be at large, takes the risk of their loss, or of injury to them by unavoidable accident; and the company, by leaving its road unprotected by an enclosure, runs the risk of animals at large getting upon the road, without any remedy against the owner of the animals. *Ibid.*

6. The liability to make reparation for an injury by negligence, is founded upon an original moral duty enjoined upon every person, so to conduct himself, or exercise his own rights, as not to injure another. *Ibid.*

7. The mere fact that one person is in the wrong, does not necessarily discharge another from the due observance of proper care towards him, or the duty of so exercising his own rights, as not to do him any unnecessary injury. *Ibid.*

8. The doctrine that, in the case of an injury by negligence, where the parties are mutually in fault, the injured party is not entitled to redress, is subject to the following material qualifications, as appears from a review of the decisions both in England and in this country, on the subject, to wit:

The injured party, although in the fault to some extent—at the time, may, notwithstanding this, be entitled to reparation in damages for an injury, which he used ordinary care to avoid.

When the negligence of the defendant in a suit upon such ground of action, is the *proximate* cause of the injury, but that of the plaintiff only *remote*, consisting of some act or omission not occurring at the time of the injury, the action is maintainable.

Where a party has in his custody or control dangerous instruments, or means of injury, and negligently places or leaves them in a situation unsafe to others, and another person, although at the time even in the commission of a trespass, or otherwise somewhat in the wrong, sustains an injury thereby, he may be entitled to redress.

And when the plaintiff, in the *ordinary exercise of his own rights*, allows his property to be in an exposed and hazardous position, and it becomes injured by the neglect of ordinary care on the part of the defendant, he is entitled to reparation, on the ground that although in allowing his property to be exposed to danger, he took upon himself the risk of loss or injury by *mere accident*, he did not thereby discharge the defendant from the duty of observing *ordinary care*, or in other words, voluntarily incur the risk of injury by the defendant's *negligence*. *Ibid.*

9. Having left its railroad unenclosed through a country where domestic animals are allowed to be at large, and thus exposed to the casualties of the animals accidentally getting upon the railway track, it is the duty of the railroad company, acting through its agents, to use *at least ordinary and reasonable care, and diligence* to avoid unnecessary injury to the animals, when found in the way of a train on the road. *Ibid.*

10. The first and paramount object of the attention of the agents of the company, is due regard for the safety of the persons and property in their charge on the train, for which they are held to a high degree of care, and so far as consistent with this paramount duty, they are bound to the exercise of what in that peculiar business would be *ordinary and reasonable care* to avoid unnecessary injury to animals casually coming upon their unenclosed road; and *for any injury to animals arising from a neglect of such care, the company is liable in damages to the owner*. *Ibid.*

#### RECORDING ACT.

See Mortgage.

#### REGISTRATION ACT.

See Ship, 5, 6.

#### RESERVATION.

See Deed.

#### SCHUYLER FRAUD.

See Agency.

#### SEAMAN'S WAGES.

See Ship, 4. Lien, 9—12.

#### SET-OFF.

1. As a general rule, debts sued for and intended to be set off, must be mutual and due in the same right. *Prouty vs. Hudson*. - - - 40

2. Where a judgment has been obtained against executors *individually*, they cannot set off this judgment against one obtained by the decedent in his life-time against their judgment creditor, because the claims are not between the same parties nor in the same rights. *Ibid.*

#### SHIPS.

See Admiralty, Collision, Lien.

1. The Court confirming its decision in the case of *Smith vs. The Creole and Sampson*, (2 Wallace, Jr. 485,) applies more strongly the doctrines of that case; and holds that when even small vessels, as coal heavers, are in tow, the towing boat is the servant of the vessel towed, and that the tug, being thus bound to obey the orders of the other vessel, is not responsible, though in point of fact giving orders to her, for damages in the proper course of its employment. *The Steam Tug Sampson*. - - - 337

2. Though the rule of porting the helm is obligatory, when in ordinary cases vessels meet in the same line, it is not one always to be observed when they are in *parallel* lines. Circumstances control the rule; and, when a boat is moving against the tide, slowly and with difficulty, (as when tugging a heavy vessel,) and is out of the centre of the channel, which is left free to the other, the rule can have no application. *Ibid.*

3. Steamers, especially large steamers, are held to the strictest care possible when in ports or in the neighborhood of sailing and smaller vessels; and must move slowly and with extreme circumspection. And if from violation of this duty, small or sailing vessels are put suddenly into confusion or jeopardy, the Court will not inquire whether the rules applicable to ordinary cases of meeting, have been strictly observed by the weaker vessel, or not; but will hold the steamer responsible, as reckless, for all injury happening to or committed through the act of the weaker vessel, from mistake caused by the embarrassment natural to the condition into which the steamer had put the weaker vessel. *Ibid.*

4. By the terms of the Treaty between the United States and the Hanseatic Towns, a Court of Admiralty here has no jurisdiction of a libel for wages by a Bremen sailor against a Bremen vessel, though he had shipped in the United States. *Kendep't vs. The Barque Korner.* - - 47

5. Construction of the Act of 29th July, 1850, relating to conveyance of vessels. *Reeder vs. Steamship George's Creek.* - - 232

6. A recorded mortgage of a vessel does not take priority over a subsequent lien, obtained by a material man, for necessary supplies or repairs. *Ibid.*

## SLAVE.

See Contract, 6, &c.

## STEAMBOAT.

1. The boat will be liable, when it is furnished with state rooms and locks to the doors, if a watch, breastpin, pocket-money, and such like, should be stolen from the room in the night-time, without breaking. This is the general rule, though there are exceptions. *Vanderpool vs. The Steamboat Crystal Palace.* - - 493

2. Where such is the structure of the berths, the officers of the boat must know whether the locks are in order or not; and if not, they must look to the protection of such property of the passenger, as before mentioned. It is not the duty of the passenger, in such case, as a general rule, to take such articles to the clerk, or other officer, for safe keeping. They are part of his personal apparel, and the inconvenience would be too great. *Ibid.*

## STEAM TUGS.

See Ship. 1.

## SUPERSEDEAS.

See Equity. 2.

## TAX SALE.

1. Where land is sold under a tax-law, it is necessary that every prerequisite in the statute should be strictly complied with; otherwise, the purchaser under the tax-sale will take no title. *Yendo vs. Wheeler,* - 806

2. An assessment to be valid under the Texas statute, with a view of collecting the taxes, must embrace a true description of the land, together with the name of the actual owner, whether resident or non-resident, and such other descriptive matter as will apprise the owner that his land is about to be sold for taxes. *Ibid.*

## THEFT.

See Steamboat.

## TRUSTS.

See Charitable Uses.

## UNITED STATES COURTS.

See Habeas Corpus.

## VENDOR AND VENDEE.

See Bill of Exchange.

1. A covenant "to make a good and sufficient deed of conveyance" is not satisfied by the execution of a deed good in point of *form* only; there is an implied undertaking to make a good title. *Burwell vs. Jackson*, - 279

2. In an executory agreement to purchase land, the purchaser is not bound to examine the title before entering into the agreement, and if the title prove defective upon examination, the vendee cannot be compelled to take it. *Ibid.*

3. The implied warranty of the vendor ceases upon the execution of the deed, as the vendee is presumed to have examined the title and to be satisfied with it. *Ibid.*

4. The cases of *Gazely vs. Price*, and *Parker vs. Parmlee*, commented on. *Ibid.*

5. The covenants in this case are dependent covenants, and the execution of the deed is a condition precedent to the payment of instalments subsequent to the first. *Ibid.*

6. Where the title of a vendor who has covenanted to convey is totally destroyed, the vendee is not bound, either to offer to perform on his part, or to require performance by the vendor, but may treat the contract as rescinded. *Ibid.*

## WILL.

1. Proof of the regular execution of a testamentary paper establishes a prima facie case in favor of the party alleging a will. *Davis vs. Davis' Executor*, - - - - - 533

2. Definition of a will. *Ibid.*

3. The competency of parol testimony, in order to ascertain whether a paper writing purporting to be a last will, considered, and such testimony admitted. *Ibid.*

4. The party propounding the will must show that the document in question was made as a will, by one capable of making a will, having a knowledge that he was making a will, and informed of its contents.

5. The executor and trustee, who takes an interest in a will, cannot be a witness to sustain it. *Ibid.*

6. When a devise or bequest is ambiguously expressed, it is always important to bear in mind the inclination which the law has in favor of the heirs, which, with us, is a rule of equality, and also in favor of a vesting of the estate at the death of the testator, or at the earliest possible period thereafter, and also in favor of an absolute, and against a defeasible estate. *Matter of Etter's Will*, - - - - - 42

7. It is under the influence of this bias, that words of survivorship are generally referred to at death of the testator, if there be nothing indicating a contrary intention. *Ibid.*

8. Where land was devised to a son for life, with the provision that at his death, without issue living, it "shall revert to my estate, and shall be sold by my executors, and the proceeds thereof be distributed among my surviving heirs herein named, agreeably to the intestate laws of Pennsylvania." *Held*, that this created a vested remainder in the devisees and legatees living at the death of the testator, subject to be divested on the son's dying, leaving issue, and that the share of one of the devisees who died before the termination of a precedent estate, passed to her legal representatives. *Ibid.*

9. "Heirs" construed to mean children, from the context. *Parish vs. Ferris*, - - - - - 101

10. Adverbs of time, as *when, then, after, from, &c.*, in a devise of a remainder are to be construed as relating to the time of the enjoyment of the estate, not to that of its vesting in interest. *Ibid.*

11. Devise of a life estate, and if the first taker, "should die without children," then over, *held* under the circumstances to mean *without having had* children. *Ibid.*

12. A testator devised as follows: Secondly, "to my daughter E, the use" of 267 acres of land, "during her natural life, to have full use and control of the same, with the appurtenances to the same belonging, as long as she shall live." Thirdly, He devised to his "daughter E's children, (if she shall have any heirs,) their heirs and assigns forever," the 267 acres of land "after E is done using and occupying it, and at E's death." Fourthly, If his "daughter E should die without children," then he devised the 267 acres to his "brothers and sisters, their heirs and assigns forever, after the death of E as aforesaid. E was unmarried at the testator's death, but married afterwards. She had but one child, which lived only a few hours, and soon died herself, having devised all her estate to her husband.

*Held*, that the limitation to E's children, and that to the testator's brothers and sisters, were alternative contingent remainders in fee, the contingency being the *birth* of children; and that the first remainder vested in E's child at its birth, descended at its death, upon E; and then passed under her will to her husband. *Ibid.*













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